CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 187

THE G AND K MANUFACTURING COMPANY,
PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITION FOR CERTIORARI FILED JUNE 28, 1935.

CERTIORARI GRANTED OCTOBER 14, 1935.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 187

THE G AND K MANUFACTURING COMPANY,
PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

INDEX.

	Original	Print
Proceedings before United States Board of Tax Appeals...	1	1
Docket entries	1	1
Petition	3	3
Answer	6	4
Amended petition	7	5
Exhibit "A"—Notice of deficiency	10	7
Answer to amended petition	14	11
Second amendment to petition	16	11
Answer to second amendment to petition	18	13
Stipulation of facts	19	13
Exhibit No. 1—Memorandum of agreement, August 23, 1929, between Gelfand Co. and Kraft-Phenix Corp.	22	17
Exhibit "A"—Statement of Gelfand Co., as of June 30, 1929	32	25
Exhibit "B"—Statement of Gelfand Co., year ending December 31, 1928	35	28
Exhibit "C"—Form of employee's contract...	40	33

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 29, 1935.

—7040-C

	Original	Print
Exhibit No. 2—Agreement of November 12, 1929, between Gelfand Co. and Kraft-Phenix Corp.	44	36
Exhibit No. 3—Certificate of stock	47	38
Memorandum opinion, Trammell, M.,	49	39
Motion for judgment	53	43
Decision	54	43
Petition for review	55	44
Notice of filing of petition for review	61	49
Statement of evidence	62	49
Caption	62	49
Testimony of James Arthur Warner	63	50
Thomas P. Trevvcett	74	60
Order settling statement of evidence	81	67
Petitioner's Exhibit No. 4—Articles of amendment showing change in name of Gelfand Co.	81	67
Præcipe for record	84	69
Clerk's certificate (omitted in printing)	86	
Proceedings in U. S. C. C. A., Fourth Circuit	87	71
Docket entries	87	71
Opinion, Soper, J.	89	72
Judgment	97	78
Recital as to issuance of mandate	97	78
Clerk's certificate	98	79
Order allowing certiorari	99	81

[fol. 1]

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 63673

THE G. AND K. MANUFACTURING CO., Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

APPEARANCES:

For Taxpayer: Theodore Witkin, Esq., (withdrawn); Maurice Kay, Esq., (withdrawn); Hicklin Yates, Esq., Llewellyn A. Luce, Esq.,

For Commissioner: T. M. Mather, Esq., E. M. Woolf, Esq.

DOCKET ENTRIES

1932.

Apr. 1. Petition received and filed. Taxpayer notified. Fee paid.

" 1. Copy of petition served on General Counsel.

May 13. Answer filed by General Counsel.

" 27. Copy of answer served on taxpayer, General Calendar.

1933.

Apr. 18. Hearing set May 17, 1933.

May 12. Notice of the appearance of Maurice Kay, counsel for taxpayer.

" 12. Notice of the appearance of Hicklin Yates, counsel for taxpayer.

[fol. 2]

May 12. Motion for continuance of sixty days from May 18, 1933, filed by taxpayer. May 15, 1933, granted to fall, 1933.

June 5. Motion for leave to file amended petition filed by taxpayer. Amended petition lodged. June 7, 1933, granted. June 9, 1933, copy served.

July 1. Answer to amended petition filed by General Counsel.

" 8. Copy of answer to amended petition served on taxpayer.

" 29. Notice of the withdrawal of Theodore Witkin, counsel for taxpayer.

1933.

Sept. 27. Motion to place on Reserve Calendar filed by taxpayer. September 27, 1933, denied.

" 25. Hearing set November 8, 1933.

Oct. 30. Notice of the withdrawal of Maurice Kay, counsel for taxpayer.

" 30. Notice of the appearance of Llewellyn A. Luce, as counsel for taxpayer filed.

" 30. Motion for continuance to December 15, 1933, filed by taxpayer. November 1, 1933, granted to December 14, 1933.

Dec. 14. Hearing had before Mr. C. M. Trammell, Division 2. Submitted on merits. On petitioner's motion, amended petition filed—no objection. (Copy has been served on respondent by petitioner.) Second amended petition and stipulation of facts filed. Petitioner's brief due forty-five days, January 29, 1934. Respondent thirty days to reply, March 1, 1934.

" 27. Transcript of hearing, December 14, 1933, filed.

1934.

Jan. 27. Motion for an extension of fifteen days from January 29, 1934, to file brief, filed by taxpayer. January 27, 1934, granted.

Feb. 12. Motion for extension of five days to file brief, filed by taxpayer. February 13, 1934, granted.

" 19. Brief filed by taxpayer. February 20, 1934, copy served.

" 27. Reply brief filed by General Counsel.

Apr. 16. Memorandum opinion rendered, Charles M. Trammell, Division 2. Judgment will be entered under Rule 50.

[fol. 3]

Apr. 21. Motion for order of redetermination filed by General Counsel.

" 24. Hearing set May 16, 1934.

May 16. Hearing had before Mr. Sternhagen on settlement, Rule 50. Not contested. Petitioner's acquiescence filed. Referred to Mr. Trammell for decision.

" 17. Decision entered, Division 15, Eugene Black.

1934.

Aug. 15. Petition for review by U. S. Circuit Court of Appeals, Fourth Circuit, with assignments of error filed by taxpayer.

" 15. Proof of service filed.

Oct. 14. Certified copy of an order from U. S. Circuit Court of Appeals, Fourth Circuit, extending time to November 13, 1934, to complete record filed.

Nov. 7. Agreed præcipe filed—proof of service thereon.

" 7. Agreed statement of evidence lodged.

" 7. Agreed statement of evidence approved and ordered filed.

" 13. Order enlarging time to December 10, 1934, for transmission and delivery of record, entered.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PETITION—Filed April 1, 1932

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau Symbols IT:AR:C-6 GES) dated February 2, 1932, and as a basis of its proceeding alleges as follows:

[fol. 4] First. The petitioner is a domestic corporation organized and existing under and by virtue of the laws of the State of Maryland, with its principal office in care of Benjamin Harriman, 405 Lexington Avenue, New York City.

Second. The notice of deficiency (a copy of which is attached hereto and marked Exhibit "A") was mailed to the petitioner on February 2, 1932.

Third. The taxes in controversy are income taxes for the calendar year 1929 and for the sum of $19,805.16.

Fourth. The determination of tax set forth in the said notice of deficiency is based upon the following error:

The action of the Commissioner in increasing the value of 17,250 shares of the capital stock of Kraft-Phenix Cheese

Company, representing in part the proceeds of the sale of the petitioner's assets to the said Kraft-Phenix Cheese Company, by increasing the per share value of said stock from $20.00 per share to $30.4375 per share, thereby computing an additional profit on said transaction in the sum of $180,046.88.

Fifth. The facts upon which the petitioner relies as the basis of this proceeding, are as follows:

(a) On November 12, 1929, the petitioner sold its assets to the Phenix Cheese Company and received therefor $200,000.00 in cash and 17,250 shares of common stock of the latter corporation.

(b) Said assets had a cost basis to the petitioner in the sum of $223,055.04.

(c) Pursuant to the provisions of the contract of sale made in connection with this transaction, the petitioner agreed not to sell, dispose of, or negotiate the 17,250 shares of said stock at any time prior to February 15, 1930.

(d) Said stock of the Kraft-Phenix Cheese Company [fol. 5] had no ready realizable market value on November 12, 1929, or if it had any value whatsoever, such value was not in excess of $15.00 per share.

Wherefore petitioner prays that this Board may hear the proceeding and redetermine the tax liability of the petitioner in accordance with the issues hereinabove set forth.

(Sgd.) Theodore Witkin, of Kamerman & Witkin, Attorneys for Petitioner, 1501 Broadway, New York City.

Duly sworn to by Simon Gelfand. Jurat omitted in printing.

[fol. 6] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

ANSWER—Filed May 13, 1932

Comes now the Commissioner of Internal Revenue by his attorney, C. M. Charest, General Counsel, Bureau of

Internal Revenue, and for answer to the petition filed herein, admits and denies as follows:

First. Admits the matter set forth in Paragraph First of the petition.

Second. Admits that the notice of deficiency was mailed to the petitioner on February 2, 1925, and denies the remainder of Paragraph Second of the petition.

Third. Admits the matters set forth in Paragraph Third of the petition.

Fourth. Denies that the respondent erred as alleged in Paragraph Fourth of the petition.

Fifth—(a) to (d) inclusive. Denies the matters set forth in subparagraphs (a) to (d), inclusive, of Paragraph Fifth of the petition.

Denies each and every other allegation contained in the petition not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the Commissioner's de- [fol. 7] termination be approved and that the petition be dismissed and the appeal denied.

(Signed) C. M. Charest, General Counsel, Bureau of Internal Revenue. Of Counsel: A. H. Fast, F. L. Van Haaften, Special Attorneys, Bureau of Internal Revenue.

fvl-fw-5/6/32.

Before United States Board of Tax Appeals

[Title omitted]

Amended Petition—Filed June 7, 1933

The above named petitioner, by this amended petition, hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau Symbols IT:AR:C-6 GES) dated February 2, 1932, and as a basis of its proceeding alleges as follows:

First. The petitioner is a domestic corporation organized and existing under and by virtue of the laws of the State of

Maryland, with its principal office in care of Benjamin Harriman, 405 Lexington Avenue, New York City.

Second. The notice of deficiency (a copy of which is attached hereto and marked Exhibit "A") was mailed to the petitioner on February 2, 1932.

[fol. 8] Third. The taxes in controversy are income taxes for the calendar year 1929, the full amount of which is in controversy.

Fourth. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) The action of the Commissioner in increasing the value of 17,250 shares of the capital stock of Kraft-Phenix Cheese Company, representing in part the proceeds of the sale of the petitioner's assets to the said Kraft-Phenix Cheese Company, by increasing the per share value of said stock from $20.00 per share to $30.4375 per share, thereby computing an additional profit on said transaction in the sum of $180,046.88.

(b) The action of the Commissioner in including as income for the year 1929 any part of the value of the 17,250 shares of stock of the Kraft-Phenix Cheese Company.

Fifth. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) On November 12, 1929, the petitioner sold its assets to the Phenix Cheese Company and received therefor $200,000.00 in cash and 17,250 shares of common stock of the latter corporation.

(b) Said assets had a cost basis to the petitioner in the sum of $223,055.04.

(c) That pursuant to the provisions of the contract of sale made in connection with this transaction, the petitioner agreed to and was thereby restricted from selling, disposing of, or negotiating the 17,250 shares of said stock at any time prior to February 12, 1930, and that the certificates delivered to petitioner in accordance with said contract bore, by endorsement upon their face, such a limitation as to their disposition; that said petitioner was precluded, both, under the terms of the contract and by endorsement upon the certificates themselves, which endorsement was a

[fol. 9] notice to any purchaser for value that the certificates were restricted in their negotiability, from disposing of them prior to February 12, 1930.

(d) Said stock of the Kraft-Phenix Cheese Company had no ready realizable market value to the petitioner.

(e) That any and all income received by virtue of the sale hereinbefore referred to not only accrued but actually was received during the year 1930, therefore petitioner is not chargeable with any income from said stock in the year 1929.

(f) That petitioner kept his books on an accrual basis and, as his rights to dispose of the stock accrued in 1930, any income accruing on said transaction should be included in his income for the year 1930.

Wherefore petitioner prays that this Board may hear and determine that there is no deficiency for the year 1929 and that the petitioner is entitled to a refund of tax of $26,412.53 paid for said year.

Hicklin Yates, Counsel for Petitioner, Tower Building, Washington, D. C. Of Counsel: Maurice Kay, Investment Building, Washington, D. C.

Duly sworn to by Simon Gelfand. Jurat omitted in printing.

[fol. 10] EXHIBIT "A" TO AMENDED PETITION

Office of Commissioner of Internal Revenue

Treasury Department, Washington

Address reply to Commissioner of Internal Revenue and refer to IT:AR:C-6 GES.

Feb. 2, 1932.

The G and K Manufacturing Co., c/o Mr. Benjamin Harriman, 405 Lexington Avenue, New York City, New York

SIRS:

You are advised that the determination of your tax liability and that of your affiliated companies for the year 1929 discloses a deficiency of $19,805.16 as shown in the

statement which is attached to and made a part of this letter.

[fol. 11] In accordance with section 272 of the Revenue Act of 1928 and Article 16 of Regulations 75 relating to consolidated returns of affiliated corporations prescribed under section 141 (b) of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability and that of your affiliated companies.

However, if you do not desire to petition, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your return by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; whereas if no agreement is filed, interest will accumulate to the date of assessment of the deficiency.

Respectfully, David Burnet, Commissioner, by J. C. Wilmer, Deputy Commissioner.

Enclosures: Statement, Form 882, Form 870-C-29, Schedules 1 to 4, inclusive.

[fol. 12] Statement

IT:AR:C-6 GES.

Returns Examined

	Form	Year
Parent Company		
The G and K Manufacturing Co., c/o Mr. Benjamin Harriman, 405 Lexington Avenue, New York, New York	1120	1929
Sudsidiary Company		
Pickle Products Co., Inc., 1210 South Lakewood Avenue, Baltimore, Maryland	1122	1929

Tax Liability

Tax liability of the G and K Manufacturing Co., and each subsidiary company above-named as provided for in article

15 (a) of Regulations 75, prescribed under section 141 (b) of the Revenue Act of 1928:

Year	Tax Liability	Tax Assessed	Deficiency
1929	$46,217.69	$26,412.53	$19,805.16

In accordance with article 16 (a) of Regulations 75, the deficiency will be assessed severally against said corporation named above.

The G. and K Manufacturing Co.

Year ended December 31, 1929

Schedule 1

Adjustments to Net Income

Net income as disclosed by return	$282,116.98
As corrected	462,163.86
Net adjustment as computed below	$180,046.88

[fol. 13] Unallowable deductions and additional income:

(a) Additional profit on sale of assets	$180,046.88

Schedule 1-A

Explanation of Items Changed

(a) On November 12, 1929, the taxpayer sold its assets to the Kraft-Phenix Cheese Co., and received cash in the amount of $200,000.00 and 17,250 shares of the capital stock of the latter corporation. In computing the profit on the transaction such stock was valued at $20.00 per share, whereas it was quoted on the New York Stock Exchange on November 12, 1929, as follows: High 32⅞, Low 28, making an average of $30.4375.

The additional profit is computed as follows:

17,250 x $30.4375	$525,046.88
17,250 x $20.00 (value used)	345,000.00
Additional profit	$180,046.88

Pickle Products Co., Inc.

Schedule 2

Adjustments to Net Income

Net loss as disclosed by return	($42,003.07)
As corrected	($42,003.07)
Net adjustment as computed below	None.

Schedule 3

Consolidated Net Income

Net income as corrected:		
The G and K Manufacturing Co.	$462,163.86	
Total		$462,163.86
[fol. 14] Net losses as corrected:		
Pickle Products Co., Inc.	42,003.07	
Total		42,003.07
Aggregate net income		$420,160.79
Consolidated net income		$420,160.79

Schedule 4

Computation of Tax

Income Tax

Net income for taxable year (consolidated)	$420,160.79
Balance subject to tax	420,160.79
Income tax, 11%	46,217.69
Total tax assessable	46,217.69
Total previously assessed	26,412.53
Additional tax to be assessed	$19,805.16

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

ANSWER TO AMENDED PETITION—Filed July 1, 1933

Comes now the Commissioner of Internal Revenue, by his attorney, E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue, and for answer to the amended petition filed herein, admits and denies as follows:

[fol. 15] First. Admits the matter contained in Paragraph First of the amended petition.

Second. Admits that the notice of deficiency was mailed to the petitioner on February 2, 1932, and denies the remainder of Paragraph Second of the amended petition.

Third. Admits that the taxes in controversy are income taxes for the calendar year 1929 and denies the remainder of Paragraph Third of the amended petition.

Fourth—(a) and (b). Denies that the respondent erred as alleged in subparagraphs (a) and (b) of Paragraph Fourth of the amended petition.

Fifth—(a) to (f) inclusive. Denies the matters set forth in subparagraphs (a) to (f) inclusive, of Paragraph Fifth of the amended petition.

Denies each and every other matter contained in the amended petition not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the appeal be denied.

(Signed) E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue. Of Counsel: A. H. Fast, F. L. Van Haaften, Special Attorneys, Bureau of Internal Revenue.

[fol. 16] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

SECOND AMENDMENT TO PETITION—Filed at Hearing Dec. 14, 1933

Comes now the petitioner herein, by and through its counsel of record, and amends the original petition and the amended petition filed herein by alleging as follows:

(a) The respondent erred in determining that the fair market value of 17,250 shares of common stock in the Kraft-Phenix Cheese Corporation, received by petitioner during the year 1929, constituted taxable income to the petitioner for the year 1929. This for the reason that the transaction between the Gelfand Manufacturing Company and the Kraft-Phenix Cheese Corporation, as a result of which petitioner (successor to Gelfand Manufacturing Company) received $200,000 in cash and 17,250 shares of common stock in the Kraft-Phenix Cheese Corporation, was, under the Revenue Acts of 1926 and/or 1928, a reorganization.

Accordingly, under the provisions of said Revenue Acts and the Regulations of the Bureau of Internal Revenue thereunder, only the cash received by this petitioner from the Kraft-Phenix Cheese Corporation was subject to tax, as in a transaction of this kind, constituting a reorganization, the pertinent provisions of said Revenue Acts and the Commissioner's Regulations thereunder limit the taxable profit to the amount of cash received.

(b) The respondent erred in failing to determine that the transaction by which the Gelfand Manufacturing Company and its successor, the petitioner, transferred substantially all of its assets to the Kraft-Phenix Cheese Cor- [fol. 17] poration in exchange for cash and stock in said Kraft-Phenix Cheese Corporation, constituted a reorganization, and also in failing to determine that the Gelfand Manufacturing Company and its successor, the petitioner in this cause, and the Kraft-Phenix Cheese Corporation were parties to said reorganization.

(c) The respondent erred in determining that said 17,250 shares of common stock in the Kraft-Phenix Cheese Corporation had any fair market value whatsoever on November 12, 1929, when received by the petitioner in this case. This for the reason that pursuant to agreements entered into between the Gelfand Manufacturing Company, its successor, the petitioner herein, and the Kraft-Phenix Cheese Corporation, said 17,250 shares of stock could not be transferred by the petitioner, such transfer being restricted until February 12, 1930, by reason of said agreement and endorsements placed upon the shares of stock

issued to the Gelfand Manufacturing Company and/or its successor, the petitioner in this cause.

Wherefore, it is prayed that this second amendment to the pleadings filed herein be made a part of the record of the Board and that the statements contained herein be regarded as additional allegations of error on the part of the Commissioner, and that the Board determine that this petitioner overpaid its taxes for the calendar year 1929.

Respectfully submitted, Llewellyn A. Luce, John S. Hornback, 937 Munsey Building, Washington, D. C., Counsel for Petitioner.

[fol. 18] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

ANSWER TO SECOND AMENDMENT TO PETITION—Read into the Record Dec. 14, 1933

* * * Mr. Mather: There is no objection, your Honor, inasmuch as this is the second amended petition; it is merely an assignment of errors and is not claiming any new facts.

Under the Board's rules, I assume that an answer is required. In this particular amendment there are allegations of error, and may the record show in this proceeding that those allegations of error are denied by the respondent, and that no written amended answer will be filed.

The Member: That is your original answer.

Mr. Mather: That was my original answer, and I deny the original assignment of error, and in the second amended petition.

[fol. 19] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

STIPULATION OF FACTS—Filed at Hearing, Dec. 14, 1933

It is hereby stipulated that the following facts are agreed upon by the parties hereto, through their respective counsel of record, and that these facts may be found by the Board as true and correct:

(1) The Gelfand Manufacturing Company was organized for the manufacture and sale of food products and was incorporated under and by virtue of the laws of the State of Maryland on the first day of January, 1924, and during the year 1929, here involved, it maintained its principal office at 405 Lexington Avenue, New York City.

(2) On August 23, 1929, the Gelfand Manufacturing Company entered into a written agreement with the Kraft-Phenix Cheese Corporation, a corporation organized and existing under and by virtue of the laws of the State of Illinois. Said agreement is attached hereto as Exhibit 1 and made a part of this stipulation.

(3) On the 12th day of November, 1929, the Gelfand Manufacturing Company and the Kraft-Phenix Cheese Corporation entered into an agreement supplementing the agreement between the two corporations under date of August 23, 1929. Said agreement of November 12, 1929, is attached hereto as Exhibit 2 and made a part of this stipulation.

(4) On November 12, 1929, the agreements of August [fol. 20] 23, 1929, and November 12, 1929, between the two corporations aforesaid, were carried out and the Gelfand Manufacturing Company transferred to the Kraft-Phenix Cheese Corporation its business and assets as specified in the two agreements dated August 23, 1929, and November 12, 1929. On said date, November 12, 1929, the Gelfand Manufacturing Company received from the Kraft-Phenix Cheese Corporation $200,000.00 in cash and 17,250 shares of the common stock of said Kraft-Phenix Cheese Corporation. On each of the certificates of stock in the Kraft-Phenix Cheese Corporation received by the Gelfand Manufacturing Company there was written the following: "Transfer restricted until Feb. 12-1930 as per Agreement of Nov, 12-1929". There is attached hereto, as Exhibit 3, and made a part of this Stipulation of Facts, a true photostatic copy of one of the stock certificates in the Kraft-Phenix Cheese Corporation received by the Gelfand Manufacturing Company. On November 12, 1929, the Gelfand Manufacturing Company duly changed its name to The G and K Manufacturing Company, the petitioner in this case. As provided in the supplementary agreement of November 12, 1929, and in accordance with the restriction written on

each of the shares of stock in the Kraft-Phenix Cheese Corporation received by the Gelfand Manufacturing Company, none of the certificates of stock received by said Gelfand Manufacturing Company was sold, transferred or assigned during the year 1929 by either the Gelfand Manufacturing Company and/or the G and K Manufacturing Company, successor to the Gelfand Manufacturing Company.

(5) Financial History of the Kraft-Phenix Cheese Corporation: About 1902 J. L. Kraft entered the cheese business, and on November 27, 1909, J. L. Kraft and Bros. Co. was incorporated. This company had acquired stock interests in other cheese and dairy companies and the Detroit plant and U. S. A. business of the MacLaren Imperial Cheese Co., Ltd., by July, 1921. The company continued to expand and in February, 1924, it changed its name to the Kraft Cheese Company, at the same time acquiring the assets of J. L. Kraft and Bros Co., Kraft Bros. Cheese Co., Penn Kraft Cheese Co., Langlade County Creamery Co., and Jacob Marty and Co. It also owned all of the common stock of the Kraft Cheese Co. of Wisconsin and [fol. 21] of the Kraft-MacLaren Cheese Co., Ltd., of Canada. The latter company had previously acquired all of the Canadian and foreign business, except in the United States, of the MacLaren Cheese Co., Ltd., and all of the Canadian export business of J. L. Kraft and Bros. Co. The Kraft Cheese Company continued to expand by natural growth and by purchasing competitive and related businesses until February 10, 1928, when it merged with the Phenix Cheese Company, organized in 1901 in New York and makers of a cheese going by the trade name of Philadelphia Cream Cheese, and this merger thereafter was known as the Kraft-Phenix Cheese Company, the Kraft-Phenix Cheese Corporation succeeding this company on November 10, 1928. This new corporation continued to expand and to purchase other cheese, dairy and related businesses until May 12, 1930, when its stockholders ratified an agreement by which it was merged with or sold to the National Dairy Products Corporation in accordance with an agreement reached on March 17, 1930, amended April 17, 1930, and publicly announced by the directors of the National Dairy Products Corporation on March 25, 1930. By this merger or sale agreement, the preferred stock of the Kraft-Phenix Cheese Corporation was retired at $110

and accrued dividends, and each share of common stock in the Kraft-Phenix Cheese Corporation was exchanged for $25 par value of 5¼% gold debentures due in 1948, and ½ of a share of the common stock of the National Dairy Products Corporation.

(6) The common stock of the Kraft-Phenix Cheese Corporation never sold on the New York Stock Exchange between November 12, 1929, and February 12, 1929, at so low a price as $30.4375 per share except on November 12, 1929, when it was quoted at $28 to $32⅞ per share, and on November 13, 1929, when it was quoted at $27 to $30 per share. Its price range from November 14 to November 30, 1929, was from $31 to $38.50 per share, and for subsequent months it was quoted as follows:

December, 1929	$32⅛ to $43
January, 1930	$38⅛ to $47
February, 1930	$43 to $49¼
March, 1930	$46¼ to $48⅞
[fol. 22] April, 1930	$45 to $53¾
May, 1930	$47¾ to $54⅞
June, 1930	$47 to $55⅛
July, 1930	$48⅝ to $49⅛

Each share of the common stock of the Kraft-Phenix Cheese Corporation was exchanged in the merger for $25 par value of 5¼% debentures and one-half of a share of common stock of the National Dairy Products Company, and the lowest combined price for these securities between March 1 and August 1, 1930, was equivalent to $46.50 per share of Kraft-Phenix Cheese Corporation's common stock. The merger agreement was reached on March 17, 1930, announced on March 25, 1930, amended April 17, 1930, and finally ratified on May 12, 1930. Shortly thereafter the Kraft-Phenix Cheese Company was dissolved.

(8) It is further agreed between the parties hereto that at the hearing of this proceeding either party may present to the Board any relevant material and competent evidence which is not inconsistent with the facts herein stipulated.

Llewellyn A. Luce, John S. Hornbeck, 937 Munsey Building, Washington, D. C., Counsel for Petitioner. E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue. Counsel for Respondent.

EXHIBIT No. 1 TO STIPULATION

City Solicitor's Office

Memorandum of Agreement made this 23rd day of August, 1929, by and between Gelfand Manufacturing Company, a corporation organized and existing under and by virtue of the laws of the State of Maryland (hereinafter [fol. 23] for convenience referred to as Gelfand) and Kraft-Phenix Cheese Corporation, a corporation organized and existing under and by virtue of the laws of the State of Illinois (hereinafter for convenience referred to as Kraft-Phenix).

Witnesseth:

Whereas, Gelfand desires to sell its entire business and assets and Kraft-Phenix is ready and willing to purchase said business and assets upon the following terms and conditions,

Now, therefore, in consideration of the mutual covenants herein made the parties hereto agree as follows:

First. Gelfand agrees to sell to Kraft-Phenix, or its nominee, the business conducted by said Gelfand as a going concern, including the real estate, personal property, patents, trade marks, formulæ, rights and secret processes, franchises, good will, undertakings, cash, accounts receivable, merchandise and equipment, automobiles and trucks, furniture and fixtures, inventories and supplies, claims, demands and choses in action, and all other things of value, both tangible and intangible, belonging to and constituting the assets of said business conducted by said Gelfand, being the assets shown on the statement of June 30, 1929, of said Gelfand furnished Mr. J. F. Whitney, President of Kraft-Phenix, attached hereto and marked Exhibit "A", said transfer of assets subject, however, to the liabilities shown on the aforementioned statement, said assets and liabilities being subject to such changes as may have occurred in the ordinary conduct of said business between June 30, 1929, and the date of closing of this agreement. Said assets thus sold to be free and clear of all liens, encumbrances and liabilities including liabilities for all taxes, including Federal income tax, except as disclosed by said statement of June

30, 1929, and free and clear of all claims, rights and demands of stockholders of Gelfand as such. It being under- [fol. 24] stood and agreed, however, that from the entire assets of Gelfand so purchased there is to be expressly excluded from said sale and purchase the following assets which are not included in Exhibit "A".

A. The shares of capital stock in the Pickle Products Company and The Gelfand Manufacturing Company of California, owned or held by The Gelfand Manufacturing Company. Gelfand, however, covenants and agrees to procure from the said Pickle Products Company such instruments as may be necessary to transfer to Kraft-Phenix the trade name "Salad Bowl" and any and all rights of said company to the product marketed under said name and a contract that such company will not engage in the mayonnaise or other business competitive to the business sold hereunder.

B. Investments in certain lots of ground located outside of the State of Maryland, and in no way used in connection with the business; Building and loan association accounts; also certain items due by the officers of The Gelfand Manufacturing Company to the company.

Second. Kraft-Phenix agrees to purchase in reliance upon the representations made herein and subject to the hereinafter disclosed terms and conditions, the above described assets from Gelfand and in consideration thereof to pay to said Gelfand $1,115,492.76, of which purchase price Six Hundred Thousand Dollars ($600,000|00) is to be paid in cash and the balance, i. e. ($515,492.76), to be paid by the issuance of common stock of Kraft-Phenix fully paid and non-assessable and qualified for trading on the New York Stock Exchange, the number of shares of said stock to be thus paid Gelfand to be reached by dividing the aforesaid balance, $515,492.76, by the average market price per share of Kraft-Phenix common stock on the New York Stock Exchange at the date of closing increasing by $2.50 per share.

Third. Gelfand represents and warrants to Kraft-Phenix and/or the corporation which may take over in behalf of Kraft-Phenix the assets and liabilities above referred to:

[fol. 25] (a) That said balance sheet of June 30, 1929, attached hereto and made a part hereof and marked Exhibit "A" is a true and correct statement of the assets and liabilities of the business herein agreed to be sold to Kraft-Phenix and truly and correctly shows the financial condition (including all contingent liabilities) of said business, with inventories taken at cost or market, whichever is lower, and with adequate reserves for depreciation and taxes, both Federal and State, excluding only provision for income tax for the year 1929, all in accordance with good accounting practices.

(b) That the profit and loss statement for the year ending December 31, 1928, and the profit and loss statement for the six months ending June 30, 1929, attached hereto and marked Exhibit "B", are true and correct statements showing within a variation of 5% the net profits arrived at after adequate allowance for depreciation and all other fixed charges and taxes, but excluding the current Federal income tax.

(c) That Gelfand has a good marketable title to all properties, both real and personal, reflected upon said balance sheet of June 30, 1929, free and clear from all liens and encumbrances other than that of the liabilities shown on said statement.

(d) That said business operated by Gelfand has no outstanding employment contracts, no license agreements, no suits pending or threatening against said corporation or against said business as such, which have not been disclosed in writing to Kraft-Phenix prior to the signing hereof.

(e) That all buildings, equipment and merchandise are fully covered by insurance.

(f) That the letter of date August 13, 1929, addressed to Mr. Whitney, President of the Kraft-Phenix Cheese Corporation, signed by J. Kurnik, sets forth truly the relation of the distributing business of Harry L. Carpel to Gelfand and the sales contracts of Gelfand with said Carpel; that the other sales contracts of Gelfand are as follows:

[fol. 26] March 1st, 1929—ten years—Milbourn Specialty Company, Camden, New Jersey—20% on selling price; 3% 10 days; net 30. Minimum purchases—$15,000.00;

January 2nd, 1929—ten years—Ohio Food Products Company, Cincinnati, Ohio—20% on freight shipments and 15% on express shipments—2% 10 days; net 30. Minimum purchases—$25,000.00;

January 17th, 1921—indefinite—Albemarle Grocery Company, Charlottesville, Virginia—15%; 2% 10 days; net 30. No stipulation as to minimum purchases;

April 28th, 1920 to May 15th, 1930—William Fahrer and Sons, Rochester, New York—15% and 5%; 2% 10 days; net 30. No stipulation as to minimum purchases;

January 28th, 1928—five years—A. A. Long, Asheville, North Carolina—20%; 2% ten (10) days; net 30. Minimum purchases—$14,000.00;

A similar agreement with the Raleigh, North Carolina, distributor.

(g) Gelfand represents it has no subsidiaries other than the Gelfand Manufacturing Company of California and the Pickle Products Company and that the assets and liabilities shown on Exhibit "A" do not include any of the assets or liabilities of said corporation and that operating statements shown in Exhibit "B" do not include any of the operations or profits made by said two corporations.

Fourth. Gelfand represents that it can secure, and agrees that it will secure, contracts in form satisfactory to counsel for Kraft-Phenix to be entered into with Kraft-Phenix and the corporation which shall take over said assets and liabilities in behalf of Kraft-Phenix as follows:

(a) A contract by Simon Gelfand, of Los Angeles, California, that said Simon Gelfand will not engage in or be interested as a stockholder, employee, officer or investor in the mayonnaise business or any business competitive to [fol. 27] the business now operated by Gelfand, the business assets and liabilities of which are being sold to Kraft-Phenix and to such business as it may be conducted by Kraft-Phenix or its nominee, for a period of ten (10) years from date hereof, except in the States of California, Washington, Oregon, Idaho, Utah, Nevada, Arizona and Montana and then only through the activities of the Gelfand Manufacturing Company of California, of Los Angeles, California, and that Simon Gelfand will not permit in the forty States of the United States not named above, or in the District of Columbia, or in Canada his name or the name of "Gel-

fand" to be used in the sale of mayonnaise or any of the other products now sold by Gelfand, the party hereto, and that the said Simon Gelfand will institute and prosecute any suit or legal proceeding necessary to prevent the usage of his name at the expense of Kraft-Phenix, which Kraft-Phenix may request.

(b) Contract by the Gelfand Manufacturing Company of California, of Los Angeles, California, that it will not engage in the mayonnaise business or other business competitive to the business sold hereunder or make any sale of its products in any portion of the United States other than California, Washington, Oregon, Idaho, Utah, Nevada, Arizona, and Montana and that in said States it will use labels upon its products distinguishing the products of said Gelfand Manufacturing Company of California, of Los Angeles, California, from the products manufactured by the corporation operating the business sold hereunder and that it will not sell its assets to, or merge with any other corporation except upon said other corporation assuming the agreements made with Kraft-Phenix and its nominee corporation who shall conduct said business.

(c) A contract of employment by J. Kurnik, Vice-President of Gelfand, for a term of three (3) years at a salary of Fifteen Thousand Dollars ($15,000.00) per year, in the form shown as Exhibit "C" attached hereto. Said contract shall contain restrictive covenants satisfactory to [fol. 28] counsel for Kraft-Phenix providing that said Kurnik shall not engage in or be interested as a stockholder, employee, officer or investor in any business competitive to that engaged in by Kraft-Phenix or the nominee corporation which shall take over the assets sold hereunder for a period of five (5) years after said Kurnik shall leave the employment of said Kraft-Phenix or said nominee corporation, with an agreement for injunctive relief in case of breach thereof.

(d) An indemnity contract signed by Messrs. Gelfand and Dr. J. Kurnik in which said parties agreed to indemnify Kraft Phenix and/or the company taking over said assets and liabilities against any liabilities of said business sold by Gelfand undisclosed by said statement of June 30, 1929, and against any liability for taxes of any kind other than the Federal income tax for 1929 which may attach

to said assets and which are not provided for by reserves set up in said statement.

Fifth. Gelfand represents and warrants that said business since the date of said statement, June 30, 1929, has been conducted in the usual and customary manner and hereby agrees that during the intervening time until the completion of all transactions covered hereby to conduct said business in the customary manner making no unusual commitments and selling none of its assets except in the usual and ordinary course of business, keeping Kraft-Phenix fully advised as to the operations in said business.

Sixth. Gelfand agrees to permit the auditors of Kraft-Phenix to make a complete and thorough examination and audit of the financial condition of said business in accordance with good accounting practices, making available all books and records as may be deemed necessary to said auditors. Kraft-Phenix shall likewise have access to the books, records and property of said Gelfand for proper appraisal of the physical assets of said business. Gelfand agrees to furnish Kraft-Phenix the abstracts of title, title policies or adequate opinions of reputable counsel certifying to the good and marketable title in Gelfand free and clear of all encumbrances other than shown by said state-
[fol. 29] ment of June 30, 1929, to all the real property appearing on the aforesaid statement, and further agrees to deliver at time of closing proper deeds, assignments and other documents which may be deemed necessary by counsel for Kraft-Phenix to fully convey the assets of said business herein sold to Kraft-Phenix.

Seventh. Gelfand agrees that after the date of closing of this agreement it will not engage in, conduct or carry on any similar or competitive line of business to the business herein agreed to be sold, within the United States other than in the eight states hereinbefore referred to, for a period of ten (10) years from the date of closing and further agrees that in the event Kraft-Phenix shall desire to use said name, Gelfand will take the necessary corporate steps to change its name so as to permit the use thereof by Kraft-Phenix through the organization of another corporation under said name to take over the assets purchased hereunder, such steps to be taken prior to the closing hereof.

Eighth. Gelfand warrants that its accounts receivable as shown by its statement of June 30, 1929, with all changes in the same as shall occur prior to date of transfer of the business, are accounts collectable in the ordinary course of business, to-wit, collectable in a period not longer than sixty days from the giving of such credits, and Gelfand agrees to enter into and secure Messrs. Simon Gelfand and Dr. J. Kurnik to join it as joint and several guarantors in a contract guaranteeing to Kraft-Phenix and to such corporation as it may nominate to take over such assets, that all the accounts receivable included in assets of said corporation transferred to Kraft-Phenix or its nominee corporation, are collectable in the ordinary course of business without legal proceedings within sixty days from the date such credit was given, and further agreeing in event said accounts are not paid within said sixty days, upon request from Kraft-Phenix or such corporation as may be nominated to take over the business, to take over said accounts from Kraft-Phenix or the corporation nominated to take said assets, paying for said accounts in full upon their being assigned to the guarantor or guarantors making such [fol. 30] payment. In order to avail itself of said guaranty, Kraft-Phenix, or the corporation nominated to take over such assets, shall not be compelled to assign said accounts which are not paid within the aforesaid sixty days immediately upon the termination of said sixty days, but Kraft-Phenix, or its nominee corporation, may, if it so desires, continue to hold said accounts until such time as Kraft-Phenix or its nominee corporation may decide such accounts are not collectible by ordinary processes without legal aid, but in no event longer than six months from date of taking over of said business, and said guarantors, or any of them, upon request as above provided, shall take over and pay for any or all of the accounts not collected at time of such request under the conditions above set forth. Nothing contained in this paragraph shall be construed to create any liability against Gelfand as principal, or Simon Gelfand and Dr. Jacob Kurnik, as guarantors, for accounts uncollectible as above set forth until the reserve for uncollectible accounts and claims for spoiled merchandise provided in the statement shown as Exhibit "A" shall have been exhausted; it being the intention of the parties that the said reserve shall be applicable to the uncollectible ac-

counts or to claims for spoiled merchandise, and only when and if such reserve has been exhausted either for such accounts or claims shall the liability of Gelfand, Simon Gelfand and Dr. Jacob Kurnik arise to take over and pay for *the* at request of Kraft-Phenix the accounts which may not have been collected as above set forth.

Ninth. The obligation of this contract on the part of both Gelfand and Kraft-Phenix are subject to approval of their respective Boards of Directors, it being understood that such approval shall be obtained not later than three (3) weeks from the date hereof and that upon said approval of its Board of Directors Gelfand will thereafter immediately obtain the approval and ratification of this contract by at least two-thirds of the outstanding stock of each and any class, said ratification and approval by the stockholders of Gelfand to be upon a date not later than August 31, 1929. In the event of the failure of Gelfand to notify in writing Kraft-Phenix of said approval by its Board of Directors, [fol. 31] and the ratification of this contract by its stockholders on or before September 20th, 1929, Kraft-Phenix may at its option terminate this agreement, in which event Kraft-Phenix shall have the right to be reimbursed by Gelfand for all expenses it may have incurred in the examination of the records of Gelfand and verification of said statement of June 30, 1929, and the appraisal of the property of Gelfand. In the event Kraft-Phenix shall fail to notify Gelfand in writing prior to September 3, 1929, of the approval of this contract by its Board of Directors, Gelfand at its option may terminate this Agreement.

Tenth. The transactions provided for hereunder shall be completed and delivery of the documents of title and the contracts called for herein, and payment of consideration shall be made at any time not later than sixty (60) days from the date of this Agreement upon five (5) days' notice by Kraft-Phenix to Gelfand that Kraft-Phenix is ready to carry out its obligations herein. Said delivery of documents of title and contracts and payment of consideration shall take place in such place as may be designated by Kraft-Phenix, either in the City of Chicago or the City of New York. However, if Kraft-Phenix shall be unable, after due diligence, to list the stock to be delivered as part of the consideration by said date Kraft-Phenix may postpone the date for such delivery of documents of title

and contracts and payment of consideration for an additional period of thirty (30) days. Time shall be considered as of the essence of this Agreement.

Eleventh. This Agreement shall be binding upon the successors and assigns of the parties hereto.

In witness whereof the parties hereto have caused these presents to be signed by their duly authorized officers and their corporate seals to be hereunto affixed the day and year first above written.

Gelfand Manufacturing Company, by (Signed) J. [fol. 32] Kûrnik. Attest: (Signed) Lewis E. Sobeloff, Acting Secretary.

Kraft-Phenix Cheese Corporation, by Jason F. Whitney. Attest: Oliver A. Blackburn, Secretary.

EXHIBIT "A" TO AGREEMENT

The Gelfand Manufacturing Company

Main Baltimore Plant

Assets and Liabilities (Excluding Provision for Income Taxes for the Year 1929), as of June 30, 1929

Assets

Cash		11,035.92
Accounts receivable, trade debtors	191,287.82	
Less reserve for uncollectible accounts and provisions for claims	32,670.20	
		168,617.62
Accounts receivable others		1,963.85
Claims against transportation companies		101.66
Notes receivable and accrued interest thereon		2,541.83
Trade acceptances receivable		11,250.00
Debit balances, accounts payable		102.96
Inventories		66,496.67
[fol. 33] Plant property	171,892.08	
Less reserve for depreciation	49,461.38	
		122,430.70

deferred charges:

Expense inventories	6,160.37	
Taxes	1,069.31	
Interest on notes payable	8.33	
		7,238.01
Trade marks, patents, fo-mulæ, etc.		1,000,000.00
		1,391,779.22

Liabilities

Accounts payable	88,492.21
Accounts payable, others	8,469.47
Credit balances, accounts receivable	1,351.54
Loan on life insurance policies	1,910.70
Mortgage payable and accrued interest thereon	40,309.03
Notes payable and accrued interest thereon	135,753.51
	276,286.46

"B"

The Gelfand Manufacturing Company

Main Plant—Baltimore

Profit and Loss Statement, Year Ending December 31, 1929

Taxes	1,738.80	
Insurance—Burglary, messenger, robbery, etc.	59.70	
Life insurance on officers, employees and distributors	4,518.65	
Legal fees	482.09	
Commissary expense	1,777.05	
Donations	1,761.53	
[fol. 34] Provision for bad debts	8,002.99	
General miscellaneous expenses	3,771.10	
		77,457.72
		179,858.09

Other Income:		
Discounts received	8,552.59	
Interest earned	793.38	
Profits on equipment sold and reappraised	3,374.13	
		12,720.10
		192,278.19
Deductions from Income:		
Cash discounts allowed	21,506.48	
Interest paid	9,567.50	
Loss on capital assets sold and discarded	1,672.60	
Loss on Gelfand's Mayonnaise Dist. Co., Harrisburg, Pa.	2,523.94	
Payment to I. Stein, account of Carpel Chow business	375.00	
		34,645.52
Net Profit from Operations		156,632.67
Income and Expenses Not Incident to Operation of Business		
Net profit from operations as above		156,632.67
Deduct profits on equipment sold and reappraised		3,374.13
		153,258.54
Add:		
Mr. S. Gelfand's traveling expense	1,666.00	
Insurance premiums on life officers	3,234.82	
Payments to F. Levin and other commissary expenses	1,777.05	
Donations	1,761.53	
[fol. 35]		
Interest paid	9,567.50	
Losses on capital assets sold and discarded	1,672.60	
Payment to I. Stein, account Carpel—Stein Co. Chow account	375.00	
		120,054.60
Net Income for Direct Operations of Main Baltimore Plant		

EXHIBIT "B" TO AGREEMENT

The Gelfand Manufacturing Company

Main Plant—Baltimore

Profit and Loss Statement, Year Ending December 31, 1928

Gross Sales		1,684,530.95
Less returns, allowances and trade discounts		82,066.71
Net Sales		1,602,464.24
Net Sales:		
Finished goods, inventory Jan. 1, 1928	33,902.91	
Materials used	672,204.47	
Packages	343,675.57	
Superintendence	5,216.67	
Direct factory labor	24,755.56	
Indirect factory labor	4,494.95	
Freight and express in	1,339.24	
Light, heat and power	3,013.22	
Repairs to machinery and factory equipment	1,978.24	
Laundry	1,156.45	
Insurance—fire, Workman's Com-		

[fol. 36]

pensation and Manufacturers' Liability	2,292.92	
Depreciation, building, machinery and plant equipment	8,068.87	
Miscellaneous plant expenses	2,458.24	
	1,104,557.31	
Deduct—Finished goods, inventory Dec. 31, 1928	25,096.31	
		1,079,461.00
		523,003.24

Selling and Delivery Expenses:

Advertising	148,263.59	
Commissions	8,508.97	
Freight and express out	89,774.82	
Freight and returned goods	2,396.12	
Shipping labor	7,167.40	
Trucks expense	5,038.71	
Storage	4,837.82	
		265,987.43
		257,015.81

Administrative and General Expenses:

Executive salaries	22,740.00
Office salaries	19,502.60
Administrative traveling expense	3,163.96
Administrative auto expense	2,506.54
Telephone and telegraph	2,545.94
Stationery and printing	1,661.74
Postage	1,139.08
Depreciation of office furniture and fixtures	391.06
Repairs to building	1,694.89

Note: The above statement was submitted by our (38) auditor. We believe that the result does not vary materially from the figure shown by the audit made by certified accountants. The difference is certainly less than five per-cent.

[fol. 37] "B"

The Gelfand Manufacturing Company

Main Plant—Baltimore

Profit and Loss Statement for Six Months Ending June 30th, 1929

Gross Sales:			
Mayonnaise		616,596.11	
Butt-R-Naise		25,978.23	
Salad Bowl		39,908.67	
Combination Relish		269,121.41	
Olives and Mayonnaise		4,251.97	
Thousand Island Dressing		8,265.80	
Peppy-Nut Sandwich Spread		11,141.01	
French Dressing		3,961.84	
		979,225.04	
Reclaimed oil		661.83	
			979,886.87
Less returned sales		12,332.76	
Trade discounts, special discounts and allowances		37,783.94	
			50,116.70
			929,770.17
Net Sales:			
Inventory Jan. 1, 1929	51,966.44		
Raw material purchases	381,915.52		
Jars and containers purchased	192,713.60		
Labels purchased	4,479.05		
		631,074.70	
Other Manufacturing Costs:			
Direct factory labor	13,541.20		
Superintendence	2,583.33		

[fol. 38]

Indirect factory labor	2,276.41	
Freight and express in	627.38	
Light, heat and power	1,840.00	
Repairs to machinery and factory equipment	882.53	
Laundry and wiping rags	780.00	
Depreciation—building, machinery and plant equipment	4,295.06	
Miscellaneous plant expenses	601.20	
		27,427.11
		658,501.81
Deduct Inventory June 30, 1929		66,404.04
		592,097.77
Advertising	109,579.76	
Provision for claims by trade debtors	10,000.00	
Commissions	4,894.64	
Freight and express out	54,890.54	
Freight on returned goods	1,188.57	
Hauling	460.50	
Shipping labor	2,503.86	
Auto and truck repairs, storage and depreciation	1,835.89	
Rent and storage	3,904.93	
Gasoline and oil	% 940.29	
		190,198.98
Executive salaries	8,413.00	
Office salaries	6,836.46	
Administrative traveling expenses	642.71	

[fol. 39]

Telephone and telegraph	1,279.96		
Stationery and printing	1,172.92		
Postage	451.81		
Depreciation—office furniture and fixtures	262.17		
Taxes	1,069.31		
Life insurance premiums on officers, employees and distributors	159.55		
Repairs to building	171.49		
Legal fees	262.78		
Provision for bad debts	4,645.54		
General miscellaneous expenses	806.81		
Insurance	1,182.33		
		27,356.84	
			809,653.59
Gross Profit from Operations			120,116.58
Other Income			4,472.24
			124,588.82
Deductions from income:			
Cash discounts allowed		10,786.69	
Interest expense—interest received deducted		4,472.92	
Loss on capital assets sold		651.76	
Loss on transfer of Meadows Dist. Co. territory		330.00	
			108,347.45
Add:			
Expenses not incident to operations of business:			
Interest expense—interest received deducted		4,472.92	
Loss on capital assets sold		651.76	
			5,124.68
			$113,472.13

[fol. 40] EXHIBIT "C" TO AGREEMENT

This Agreement, entered into by and between Dr. J. Kurnik, hereinafter known as Employee, and —— ——, a corporation hereinafter known as Company, Witnesseth:

First. This agreement is effective as of —— —, 1929, and is in lieu of any and all contracts existing between Employee and the predecessors of the Company entered into prior to the date hereof.

Second. Employee hereby agrees to remain in the service of the Company and the Company hereby agrees to employ the Employee for a period of three (3) years from the effective date hereof, at a salary of fifteen thousand ($15,000.00) per year.

Third. During the terms of such employment Employee shall devote all his time and attention and give his best efforts and skill exclusively to the business and interests of the Company or its subsidiaries and shall perform such services in and about the business of the Company as may from time to time be assigned to him by the Board of Directors of the Company or by the President of Kraft-Phenix Cheese Corporation and shall in all respects do his utmost to faithfully serve and develop the best interests and welfare of the Company.

Fourth. If during said employment period Employee shall invent or originate any invention, idea, recipe or other matter patentable or otherwise pertaining in any way to the business of the Company, he shall make full disclosures of the same to the Board of Directors or to the Company's attorney, and shall make no disclosure of the same to others until it has been ascertained whether the same can be patented or protected by withholding information from the public. Employee agrees to execute all necessary application papers for patents or copyrights assigning the same to the Company, its successors and assigns, in order [fol. 41] that said Company may secure United States or foreign patents, trade marks and copyrights as may be desirable, the Company paying all expenses in connection therewith. It is understood the termination of the period of employment shall not relieve the Employee of the obliga-

tion relative to refraining from disclosure or the obligation to sign and assign to the Company applications as above set forth relating to inventions, ideas, recipes and other matters, patentable, invented or originated during the term of this agreement, and the Employee agrees that notwithstanding the termination of said employment he will at all times aid and assist the Company to secure and maintain for the Company any and all rights accruing to the Company by virtue of this agreement, the Company paying all expenses and a reasonable per diem charge for services rendered subsequent to employment hereunder.

Fifth. Employee covenants and agrees that except to the extent of his employment as herein provided for in this agreement he will not directly or indirectly engage or be interested as a stockholder, officer, employee, investor or otherwise in any similar or competitive line of business within the United States as that engaged in now or during the period of this employment contract by the Company, and/or the Kraft-Phenix Cheese Corporation, provided however, that the restrictions herein shall be effective and operative only for the period of five (5) years immediately subsequent to the termination in any manner of the employment of said Employee by the Company or by the Kraft-Phenix Cheese Corporation or by any other subsidiary of said Kraft-Phenix Cheese Corporation, excluding as a "termination" any change of employment from the Company to the Kraft-Phenix Cheese Corporation or to some other subsidiary of the Kraft-Phenix Cheese Corporation; and provided further, that said restrictions shall not be deemed applicable to Alaska, Nevada, Arizona, Hardin County, Illinois, or Garrett County, Maryland; and provided further that the within covenants shall not be construed as restraining said Employees with respect to services performed or to be performed by him on behalf of the Company, Kraft-Phenix Cheese Corporation or any [fol. 42] subsidiary of said Kraft-Phenix Cheese Corporation, or the holding of stock or securities of the Kraft-Phenix Cheese Corporation, an Illinois corporation, or its successors.

Sixth. In event of any violation or violations of the restrictive covenants heretofore set forth Employee agrees and admits that the damages caused thereby will be incapable of ascertainment and irreparable and that an injunc-

tion against any such violation or violations may be issued against him as a matter of course in any action instituted therefor in addition to any other remedies which the Company may be entitled to by law, the Employee hereby acknowledging that the agreement in this paragraph contained is made for a good and valuable consideration, receipt whereof is hereby acknowledged by him.

In witness whereof, said Employee has signed, sealed and delivered this instrument and the Company has caused its corporate name to be subscribed and attested by its proper officers thereunto duly authorized by its Board of Directors.

Dated: —— —, 1929.
Attest: —— ——, by —— ——. (Seal.)

This Memorandum of Supplemental Agreement, to be attached to and made a part of an Agreement, dated August 23rd, 1929, by and between the Gelfand Manufacturing Company, and Kraft-Phenix Cheese Corporation, and to Modify said Agreement to the extent of any inconsistency.

1. "Kraft-Phenix" covenants and agrees in its own be- [fol. 43] half and in behalf of any nominee to whom any of the assets conveyed by this agreement may be transferred and in behalf of any subsidiary or successor that in the States of California, Washington, Oregon, Idaho, Utah, Nevada, Arizona and Montana, they will not at any time use or permit the use of the name of "Gelfand", "Gelfand Manufacturing Company", "Salad Bowl Dressing", or any other similar designation, the right to use said names in the said eight States being hereby reserved for the exclusive use and benefit of The Gelfand Manufacturing Company of California.

2. It is hereby agreed that "Gelfand" shall be responsible for any and all income taxes for the year 1928 and previous years, not covered by the reserve for taxes; and that "Kraft-Phenix" shall be responsible for 1929 taxes.

3. Paragraph First, sub-paragraph B, is hereby amended to read as follows:

"B—Investments in certain lots of ground located outside of the State of Maryland, and in no way used in con-

nection with the business; building and loan association accounts; also certain items due by officers of The Gelfand Manufacturing Company to that Company; also insurance on lives of Simon Gelfand and Jacob Kurnik. It is understood that none of the above mentioned items were reflected as assets in the Balance Sheet of June 30, 1929, which is attached and is a part of the Agreement dated August 23, 1929."

4. Paragraph Fifth of Exhibit "C" is hereby amended by the addition of the following words:

"Nor shall the within covenants be construed as restraining said employe with respect to holding the stock or securities or continuing as an officer of the Gelfand Manufacturing Company of California."

In witness whereof, the parties hereby have caused these presents to be signed by their duly authorized officers and [fol. 44] their corporate seals to be hereunto affixed, this — day of August, 1929.

Gelfand Manufacturing Company, by (Signed) J. Kurnik, Vice-President. Attest: (Signed) Louis E. Soberloff, Acting-Secretary.

Kraft-Phenix Cheese Corporation, by Jason F. Whitney, President. Attest: Oliver A. Blackburn. (Seal.)

EXHIBIT NO. 2 TO STIPULATION

This agreement, made this 12th day of November, 1929, by and between the Gelfand Manufacturing Company, party of the first part, Kraft Corporation, party of the second part, and Kraft-Phenix Cheese Corporation, party of the third part—Witnesseth:

Whereas, the parties of the first and third parts heretofore entered into an agreement dated the 23rd day of August, 1929, for the sale by the party of the first part to the party of the third part of certain assets of the party of the first part; and

Whereas, said agreement provided for payment of the purchase price as therein more fully set forth; and

Whereas, the parties hereto are desirous of adjusting the method of paying the said purchase price; and

[fol. 45] Whereas, the party of the second part is a subsidiary wholly owned by the party of the third part:

Now, therefore, in consideration of One Dollar, each to the other in hand paid and other good and valuable considerations each to the other paid, receipt whereof is hereby acknowledged, the parties hereto agree as follows:

First. The purchase price is hereby fixed at the sum of $200,000 in cash and Seventeen thousand two hundred fifty shares of the common stock of Kraft-Phenix Cheese Corporation as authorized and existing as of the date hereof.

Second: The party of the second part agrees that it will not sell or assign the stock turned over to it hereunder without the written consent of the party of the third part prior to February 12, 1930, and that in the event that during said period or at any time within ninety days of its termination the holders of a majority of the common stock of the party of the third part deposits the same under and pursuant to any plan of reorganization, merger or consolidation, that the party of the third part will deposit its then said holdings of Kraft-Phenix Cheese Corporation common stock in like manner and upon like terms.

Except as therein modified said agreement of August 23rd, 1929, is in all respects ratified and confirmed.

In witness whereof the parties hereto have caused these presents to be signed by their respective officers and their corporate seals to be hereunto affixed all the day and year first above written.

The Gelfand Manufacturing Company, by Jacob Kurnik, Vice-President. Attest: Louis E. Sobeloff.

[fol. 46] Kraft Corporation, by Frank R. Pentlarge, President. Attest: Gertrude H. Woods.

Kraft-Phenix Cheese Corporation, by —— ——.

(Here follows photolithograph of Stock Certificate, side folios 47 and 48.)

EXHIBIT NO. 3

Transfer restricted until Feb. 12-1930 as per Agreement of Nov. 12-1929

48

100

N2493

100

100 SHARES

INCORPORATED UNDER THE LAWS OF THE STATE OF ILLINOIS

KRAFT-PHENIX CHEESE CORPORATION

THIS CERTIFICATE IS TRANSFERABLE IN THE CITY OF NEW YORK OR IN CHICAGO

This Certifies that --THE GELFAND MANUFACTURING CO.-- is the owner of

ONE HUNDRED

[illegible]

Dated NOV 11 1929

Oley A. Bleeth
SECRETARY

C. A. Kraft
VICE-PRESIDENT

BANKERS TRUST COMPANY
(NEW YORK)
TRANSFER AGENT

REGISTERED
NOV 11 1929

47-48

[fol. 49] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 63673

THE G AND K MANUFACTURING CO., Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

L. A. Luce, Esq., for petitioner.
T. M. Mather, Esq., for respondent.

MEMORANDUM OPINION

TRAMMELL:

This is a proceeding for the redetermination of a deficiency in income tax for 1929 in the amount of $19,805.16.

Two issues are presented.

1. Whether the transaction between the Gelfand Manufacturing Company and the Kraft-Phenix Cheese Corporation, as a result of which the petitioner received $200,000 in cash and 17,250 shares of stock in the Kraft-Phenix Cheese Corporation in exchange for substantially all of the assets of the Gelfand Manufacturing Company, was a reorganization.

2. Whether taxable profit, other than cash, was realized by the petitioner even if there were no reorganization, as a result of the fact that the stock received was restricted as to sale by written contract for a period of three months.

The facts as to the first issue were stipulated. Testimony was taken as to issue 2.

The Gelfand Manufacturing Company was organized for the manufacture and sale of food products and was incorporated under and by virtue of the laws of the State of [fol. 50] Maryland on the first day of January, 1924, and during the year 1929 here involved, it maintained its principal office at 405 Lexington Avenue, New York City.

On August 23, 1929, the Gelfand Manufacturing Company entered into a written agreement with the Kraft-Phenix Cheese Corporation, a corporation organized and existing under and by virtue of the laws of the State of Illinois.

On the 12th day of November, 1929, the Gelfand Manufacturing Company and the Kraft-Phenix Cheese Corporation entered into an agreement supplementing the agreement between the two corporations under date of August 23, 1929.

On November 12, 1929, the agreements of August 23, 1929, and November 12, 1929, between the two corporations aforesaid were carried out and the Gelfand Manufacturing Company transferred to the Kraft-Phenix Cheese Corporation its business and assets as specified in the two agreements dated August 23, 1929, and November 12, 1929. On said date, November 12, 1929, the Gelfand Manufacturing Company received from the Kraft-Phenix Cheese Corporation $200,000 in cash and 17,250 shares of the common stock of said Kraft-Phenix Cheese Corporation. On each of the certificates of stock in the Kraft-Phenix Cheese Corporation received by the Gelfand Manufacturing Company there was written the following: "Transfer restricted until Feb. 12-1930 as per Agreement of Nov. 12-1929". On November 12, 1929, the Gelfand Manufacturing Company duly changed its name to The G and K Manufacturing Company, the petitioner in this case. As provided in the supplementary agreement of November 12, 1929, and in accordance with the restriction written on each of the shares of stock in the Kraft-Phenix Cheese Corporation received by the Gelfand Manufacturing Company, none of the certificates of stock received by said Gelfand Manufacturing Company was sold, transferred or assigned during the year 1929 by either the Gelfand Manufacturing Company and/or the G and K Manufacturing Company, successor to the Gelfand Manufacturing Company.

[fol. 51] The common stock of the Kraft-Phenix Cheese Corporation never sold on the New York Stock Exchange between November 12, 1929, and February 12, 1929, at as low a price as $30.4375 per share except on November 12, 1929, when it was quoted at $28 to $32⅞ per share, and on November 13, 1929, when it was quoted at $27 to $30 per share. Its price range from November 14 to November 30, 1929, was from $31 to $38.50 per share, and for subsequent months it was quoted as follows:

December, 1929	$32⅛ to $43
January, 1930	$38⅛ to $47
February, 1930	$43 to $49¼

March, 1930	$46¼ to $48⅞
April, 1930	$45 to $53¾
May, 1930	$47¾ to $54⅞
June, 1930	$47 to $55⅛
July, 1930	$48⅝ to $49⅛

In determining the deficiency here involved the respondent determined that the common stock in the Kraft-Phenix Cheese Corporation had a fair market value of $30.4375 per share when received by the Gelfand Manufacturing Company on November 12, 1929.

The Kraft-Phenix Cheese Corporation was a corporation resulting from a merger of The Kraft Cheese Company and the Phenix Cheese Company about November 10, 1928. The resulting corporation continued to expand until in 1930. On March 17, 1930, a merger or sale agreement was reached between Kraft-Phenix Cheese Corporation and the National Dairy Products Corporation. The agreement was publicly announced by the directors of the National Dairy Products Corporation on March 25, 1930. On April 17, 1930, it was amended and on May 12, 1930, was ratified by the stockholders of the Kraft-Phenix Cheese Corporation. By this agreement the preferred stock of the Kraft-Phenix Cheese Corporation was retired at $110 per share and accrued dividends and the shares of common stock in the corporation were exchanged for $25 par value of 5¼ per cent debentures due in 1948 and ½ share of the common stock of the National Dairy Products Corporation. [fol. 52] Shortly after May 12, 1930, the Kraft-Phenix Cheese Corporation was dissolved.

Each share of the common stock of the Kraft-Phenix Cheese Corporation owned by the petitioner was exchanged in the merger for $25 par value of 5¼ per cent debentures due in 1948 and one-half of a share of common stock of the National Dairy Products Corporation. The lowest combined price for these securities between March 1 and August 1, 1930, was equivalent to $46.50 per share of Kraft-Phenix Cheese Corporation's common stock.

From the facts presented we are unable to distinguish the situation from that presented in the case of Minnesota Tea Company, 28 B. T. A. 591. In this case we do not know to what extent there was a continuing interest by virtue of the stock received by the transferring company or its stockholders for the purpose of determining whether

the transaction comes within subsection B of 112 (i) (1) of the Revenue Act of 1928. The corporation remained in existence; there is no similarity to a merger or consolidation and nothing in the nature thereof in the facts here presented which would bring the transaction within the scope of subsection A of the above section. See Pinellas Ice & Cold Storage Co., 21 B. T. A. 425, 287 U. S. 462.

In the case of John A. Nelson Company, 28 B. T. A. 529, the taxpayer transferred all of its assets, except $100,000 in cash, to a new corporation in exchange for $2,000,000 in cash and 14,060 shares of the new company's capital stock. There was no evidence of any dissolution of the transferor corporation and we held that there was no reorganization. In the Minnesota Tea case, supra, the assets of the petitioner were transferred to the Grand Union Company for $426,842.52 cash and 18,000 shares (voting trust certificates) of the Grand Union Company no par common stock which it agreed not to sell for a year. In that case we held that there was no reorganization. We can not distinguish in principle this case from those cases.

With respect to the fair market value of the stock, there [fol. 53] was testimony that the restrictive agreement as to sale for the period of three months deprived the stock of any market value. We have decided many cases involving this same principle contrary to the views of the petitioner here. See T. W. Henritze, 28 B. T. A. 1173; Newman v. Commissioner, 40 Fed. (2d) 225; certiorari denied 282 U. S. 858; Henry S. Parker, 11 B. T. A. 1336; R. H. Champlin, 28 B. T. A. 264; Tex-Penn. Oil Co., 28 B. T. A. 917; Minnesota Tea Co., supra; Wallis Tractor Co., 3 B. T. A. 981; Wright v. Commissioner, 19 B. T. A. 541; affirmed 50 Fed. (2d) 727. On authority of decided cases we hold that the restrictive agreement did not deprive the stock of fair market value and we hold that the evidence is not sufficient to overcome the presumptive correctness of the respondent's determination on this point.

Judgment will be entered under Rule 50.

Enter.

Entered Apr. 16, 1934.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

MOTION FOR JUDGMENT—Filed April 21, 1934

Comes now the Commissioner of Internal Revenue, by his attorney, Robert H. Jackson, General Counsel, Bureau of Internal Revenue, and moves the Board to enter an order of redetermination herein that there is a deficiency for the year 1929 in the amount of $19,805.16, in accordance with [fol. 54] the determination of the Commissioner from which this appeal was taken, for the reason that all of the issues presented in the appeal were decided in favor of the respondent.

Wherefore it is prayed that this motion be granted.

(Signed) Robert H. Jackson, General Counsel, Bureau of Internal Revenue. Of Counsel: T. M. Mather, Special Attorney, Bureau of Internal Revenue.

TMM/amm.

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 63673

THE G AND K MANUFACTURING CO., Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

DECISION

Pursuant to the determination of the Board, as set forth in its memorandum opinion entered April 16, 1934, it is

Ordered and decided that there is a deficiency in tax of $19,805.16 for 1929.

Enter.

(Signed) Eugene Black, Member.

ERS-b.

Entered May 17, 1934.

[fol. 55] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PETITION FOR REVIEW TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT—Filed August 15, 1934

To the Honorable Judges of the United States Circuit Court of Appeals for the Fourth Circuit:

Comes now the G and K Manufacturing Co., petitioner on review, by its attorneys, Claude I. Parker and Llewellyn A. Luce, and respectfully shows:

I

The petitioner on review (hereinafter referred to as petitioner) is a corporation organized under the laws of the State of Maryland and maintains its principal office at 405 Lexington Avenue, New York City, New York. The respondent on review (hereinafter referred to as the Commissioner) is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States. The income tax return of the petitioner for the calendar year 1929, being the taxable year involved herein, was filed with the United States Collector of Internal Revenue for the District of Maryland, whose office is located in the City of Baltimore, Maryland, which is within the jurisdiction of the United States Circuit Court of Appeals for the Fourth Circuit.

The Commissioner determined a deficiency in federal [fol. 56] income tax against the petitioner for the year 1929 in the amount of $19,805.16, and, in accordance with the provisions of Section 272 of the Revenue Act of 1928, on February 2, 1932, mailed to the petitioner by registered mail a notice of said deficiency.

Thereafter the petitioner duly filed with the United States Board of Tax Appeals, within sixty days from the date of said notice of deficiency, its petition appealing from said notice of deficiency. Thereafter the Commissioner duly filed his answer to the petition and the matter came on for hearing before the United States Board of Tax Appeals in Washington, D. C. On April 16, 1934, after the hearing of said appeal; the United States Board of Tax

Appeals promulgated a memorandum opinion and on May 17, 1934, the said Board entered its final decision and order of redetermination in said appeal, wherein and whereby said Board ordered and decided that there was a deficiency in petitioner's federal income tax for the year 1929 in the amount of $19,805.16.

The deficiency involved arose and resulted from the determination of the Commissioner that the petitioner derived a profit of not less than $525,000.88 from the sale of its assets to the Kraft-Phenix Cheese Corporation, on November 12, 1929. On November 12, 1929, petitioner, pursuant to an agreement entered into on August 23, 1925, as modified by an agreement entered into on November 12, 1929, transferred its business and assets as specified in the two said agreements to the said Kraft-Phenix Cheese Corporation. On November 12, 1929, the petitioner received from the Kraft-Phenix Cheese Corporation $200,000.00 in cash and 17,250 shares of the common stock of said Kraft-Phenix Cheese Corporation. On each of the certificates of common stock in said Kraft-Phenix Cheese Corporation received by the petitioner, there was endorsed the following: "Transfer restricted until Feb. 12-1930 as per Agreement of Nov. 12-1929". As provided in the agreement of November 12, 1929 and in accordance with the restriction written on each of the shares of common stock in the Kraft-Phenix Cheese Corporation, none of said certificates of common stock received by said petitioner were sold, trans-
[fol. 57] ferred, or assigned during the year 1929 by petitioner.

The Commissioner determined that the transaction by which the assets and business of petitioner were transferred to the Kraft-Phenix Cheese Corporation, constituted a sale and not a reorganization. The Commissioner further determined that the fair market value of the common stock of the Kraft-Phenix Cheese Corporation received by petitioner on November 12, 1929, had a fair market value on said date of $30.4375 per share.

The petitioner contended before the Board that the transaction by which it transferred its assets and business to the Kraft-Phenix Cheese Corporation was a reorganization and that the profit derived by the petitioner should, under Section 112 (d) of the Revenue Act of 1928, be limited to the amount of cash received by the petitioner. The petitioner

further contended that the shares of common stock in the Kraft-Phenix Cheese Corporation received by it on November 12, 1929, had no fair market value on said date or during the balance of said calendar year, because of the restrictions endorsed upon each share of stock and further because there was no market for said restricted stock.

The Board of Tax Appeals sustained the determination of the Commissioner and held that the transaction by which the petitioner parted with its business and assets was a sale and not a reorganization. The Board further held that the restricted shares of stock received by the petitioner had a fair market value on November 12, 1929 of $39.4375 per share.

II.

The petitioner being aggrieved by the said decision and final order of said United States Board of Tax Appeals, and being a corporation organized under the laws of the State of Maryland with principal office at New York City, New York, desires a review thereof in accordance with the provisions of the Revenue Acts of 1926 and 1928 as amended by the Revenue Act of 1934 by the United States Circuit Court of Appeals for the Fourth Circuit, within [fol. 58] which Circuit is located the office of the Collector of Internal Revenue with whom the said petitioner filed its income tax return for the year 1929.

III.

Petitioner says that in the record and proceedings before the United States Board of Tax Appeals and in the decision and final order of redetermination rendered and entered by the said United States Board of Tax Appeals, manifest error occurred and intervened to the prejudice of the petitioner, and petitioner assigns the following errors and each of them which it avers occurred in said record, proceedings, decision and final order of redetermination and upon which it relies to reverse the said decision and final order of redetermination so rendered and entered by the said United States Board of Tax Appeals, to-wit:

1. The Board of Tax Appeals erred in holding that the transaction by which the petitioner transferred its business

and assets to the Kraft-Phenix Cheese Corporation was a sale.

2. The Board of Tax Appeals erred in failing to hold that the transaction by which the petitioner transferred its business and assets to the Kraft-Phenix Cheese Corporation was a reorganization.

3. The Board of Tax Appeals erred by finding and holding that the petitioner derived a taxable profit by reason of the transfer of its business and assets to the Kraft-Phenix Cheese Corporation on November 12, 1929.

4. The Board of Tax Appeals erred in failing to find and decide that the petitioner derived no taxable profit from the transfer of its business and assets to the Kraft-Phenix Cheese Corporation on November 12, 1929.

5. The Board of Tax Appeals erred by failing to hold and decide that any profit derived by the petitioner from the transfer of its assets and business to the Kraft-Phenix Cheese Corporation should be limited to the amount of cash received for said business and assets.

[fol. 59] 6. The Board of Tax Appeals erred by finding and deciding that the restricted shares of common stock received on November 12, 1929, by petitioner from Kraft-Phenix Cheese Corporation had a fair market value of $30.4375 per share on November 12, 1929.

7. The Board of Tax Appeals erred by failing to hold and decide that the restricted shares of common stock received by petitioner in the Kraft-Phenix Cheese Corporation on November 12, 1929, had no fair market value as of November 12, 1929, or during the months of November and December, 1929.

8. The Board of Tax Appeals erred by failing to hold and decide that the restricted shares of common stock in Kraft-Phenix Cheese Corporation received by the petitioner on November 12, 1929, were not the same shares of stock as the unrestricted shares of common stock in Kraft-Phenix Cheese Corporation which were being sold upon the New York Stock Exchange during the months of November and December, 1929.

9. The Board of Tax Appeals erred by disregarding the testimony of the petitioner's witnesses that the restreted

shares of common stock in Kraft-Phenix Cheese Corporation received by petitioner on November 12, 1929, had no fair market value as of that date or during the months of November and December, 1929.

10. The Board of Tax Appeals erred by disregarding the testimony of petitioner's witnesses and rendering judgment for the Commissioner, in view of the fact that the Commissioner did not present any witnesses or adduce any evidence rebutting the testimony of the petitioner's witnesses or showing that said restricted shares of common stock in Kraft-Phenix Cheese Corporation had a fair market value as of November 12, 1929.

11. The Board of Tax Appeals erred by failing to find and decide that the determination of the Commissioner that said restricted shares of Kraft-Phenix Cheese Corporation common stock had a fair market value of $30.4375 per share on November 12, 1929, was overcome by the evi- [fol. 60] dence adduced by the petitioner which was unrebutted by said Commissioner.

12. The Board of Tax Appeals erred by holding and deciding that the said restricted shares of common stock of Kraft-Phenix Cheese Corporation had a fair market value of $30.4375 per share on November 12, 1929, when there was no evidence before the Board to support such a conclusion.

13. The Board of Tax Appeals erred in not redetermining the deficiency in favor of the petitioner and against the Commissioner and in failing to find that the petitioner had overpaid its federal income taxes for the year 1929.

Wherefore, the petitioner prays that the decision of the United States Board of Tax Appeals entered herein against it be reviewed by the United States Circuit Court of Appeals for the Fourth Circuit and that a transcript of the record be prepared in accordance with the law and with the rules of said Court and transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

(Sgd.) Claude I. Parker, (Sgd.) Llewellyn A. Luce, Attorneys for Petitioner on Review, 937 Munsey Building, Washington, D. C.

Duly sworn to by Llewellyn A. Luce. Jurat omitted in printing.

[fol. 61] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

NOTICE OF FILING OF PETITION FOR REVIEW—Filed August 15, 1934

To Robert H. Jackson, Assistant General Counsel, Bureau of Internal Revenue, Washington, D. C., Counsel for Respondent on Review.

Please take notice that the G and K Manufacturing Co., petitioner on review in the above entitled proceedings, did, on the 15th day of August, 1934, file with the United States Board of Tax Appeals a petition for review of the decision of said Board in the above entitled cause by the United [fol. 62] States Circuit Court of Appeals for the Fourth Circuit, a copy of which said petition for review is herewith served upon you.

Claude I. Parker, Llewellyn A. Luce, Attorneys for Petitioner on Review, 937 Munsey Building, Washington, D. C.

Service of a copy of the foregoing is hereby acknowledged this 15th day of August, 1934.

Robert H. Jackson, Assistant for the General Counsel, Bureau of Internal Revenue, Attorney for Respondent.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

Statement of Evidence—Lodged November 7, 1934, Filed November 7, 1934

The above entitled cause came on for hearing before the United States Board of Tax Appeals, the Honorable Charles M. Trammell presiding, on December 14, 1933. The petitioner was represented by L. A. Luce, Esquire, and the respondent by T. M. Mather, Esquire. Whereupon the

following proceedings took place and testimony was heard by the said member of the United States Board of Tax Appeals.

All of the evidence introduced by the parties to the above [fol. 63] entitled cause which is material to the determination of the assignment of errors set out by the petitioner in its petition for review by this Court of the decision of the Board of Tax Appeals is set out herein in narrative form, except where requested by a party to be set out in the form of questions and answers.

Before any witnesses were called the following proceedings took place.

Counsel for petitioner filed with the Board a second amended petition without objection from counsel for respondent. The amendment to the petition was allowed by the presiding member of the Board and the allegations therein were formally denied, for the record by counsel for respondent.

It was then agreed between counsel for petitioner and counsel for respondent that the cost of the assets transferred by petitioner to the Kraft-Phoenix Cheese Corporation on November 12, 1929 was not at issue.

There was then filed with the Board an agreed stipulation of certain of the facts involved in the case with exhibits attached. The said stipulation of facts was accepted by the Board. Said stipulation, with exhibits attached, has been made a part of the record in this cause and is incorporated in this statement of the evidence by reference.

Thereupon JAMES ARTHUR WARNER was called as a witness for the petitioner and having been first duly sworn, testified as follows:

My name is James Arthur Warner. My address is 120 Broadway, New York City, and my occupation is Investment Banker. I have been engaged in the occupation of investment banker for about two years and operate as J. Arthur Warner & Company, located at 120 Broadway, New York City. J. Arthur Warner & Company is a partnership.

Prior to becoming an investment banker, I was a broker with a stock exchange house. I was engaged in business

[fol. 64] as a broker for five years in New York City. I was engaged in business as broker during the years 1929 and 1930. I was connected with Bainbridge & Ryan and Sartorius & Smith, both companies being members of the New York Stock Exchange in New York City.

In my present business we trade in investment trust shares. These are high type of investment security and my office trades practically from one million to four million shares of these stocks a month.

Before having my present investment banking business, my duties as a broker with stock exchange houses were to buy and sell securities of the character being discussed in this particular case. In other words, my chief duty was to buy and sell listed stock exchange securities, for customers' accounts.

I was engaged in that line of endeavor for about five years. During the months of November and December, 1929, the stock market was highly speculative and panicky. During the month of November, 1929, Kraft-Phoenix Cheese Corporation stock sold on the average somewhere around $30.00 a share, but during the month of November, and I think on November 12th, they closed the book on the stock because there was an inadequate market, with respect to Kraft-Phoenix Cheese stock.

The common understanding of "fair market value" or my understanding is that a fair market is chiefly also a free market in which there is a willing meeting of the buyer and the seller, without any kind of restriction or any undue pressure. A market must be free to be fair, and to be free there must be no restriction on stock—on the sale of stock.

I have examined the transaction by which the Gelfand Manufacturing Company sold its assets to the Kraft-Phoenix Cheese Corporation. I have read the contract between the parties and familiarized myself with the listing of the stock on the market.

Thereupon the following proceedings took place:

Q. I call your attention, Mr. Warner, to Exhibit No. 2, in this case, with particular reference to the second paragraph thereof. Have you read this agreement? (Handing paper to the witness.)

A. I have.

[fol. 65] Q. And also to Exhibit No. 3 in this case, a share of stock (handing photostat copy of stock certificate to witness). Now, having in mind the second paragraph of this Exhibit No. 2, and a sample of this stock, Exhibit No. 3, and being familiar with the listing of Kraft-Phoenix Cheese Company stock upon the market, being familiar with the transactions between these two parties, being familiar with the stock that was issued, and being familiar with the market at that time, what in your opinion was the fair market value of the 17,250 shares of stock in the Kraft-Phoenix Cheese Corporation——

Mr. Mather: That is objected to.

Mr. Luce (continuing): —received by the Gelfand Company, or by the G & K Company on November 12, 1329?

Mr. Mather: That is objected to.

The Member: I think you might ask him if he has formed an opinion of the value before; then you can ask him to explain.

Mr. Luce: I asked him in an earlier question if he was familiar with the condition of the market with respect to this stock, and he testified that he was.

By Mr. Luce:

Q. Have you formed any opinion, Mr. Warner, after an investigation of this transaction and examination of those exhibits as to the fair market value of the 17,250 shares of stock which were transferred by the Kraft-Phoenix Cheese Corporation to the Gelfand Manufacturing Company, or the G & K Manufacturing Company on November 12, 1929? Have you formed an opinion?

A. I have formed an opinion.

Q. Will you state what your opinion is, Mr. Warner?

Mr. Mather: Your Honor, we object to the calling for a conclusion from the witness. The witness not having qualified.

[fol. 66] Mr. Luce: I do not see what other qualifications the witness could possibly have.

The Member: Objection overruled.

Mr. Mather: I will ask for an exception. The Board has said in many such cases that the assets of the company

are one of the things that have to be gone into to determine the value.

The Member: The witness can express an opinion. If there are some facts that he has not considered, that is another question.

Mr. Mather: I would like to note an exception.

The Member: Exception noted.

By Mr. Luce:

Q Will you state your opinion?

The Witness: We consider this stock had no market value before February 12, 1930. Therefore as of November 12, 1929, and during the months of November and December, 1929, it had no fair market value.

Mr. Mather: That is objected to as being only a conclution on the part of the witness.

The Member: Objection overruled.

Mr. Mather: Your Honor will allow me an exception.

The Member: Exception noted.

The Witness: Yes, sir.

Mr. Luce: Did you answer?

The Witness: Yes, sir; I said it had no value at that time.

The factors that I consider in reaching this conclusion are that if this stock had been presented to me for sale dur- [fol. 67] ing November or December, 1929, or at any time prior to February 12, 1930, I could not have sold it because of the restriction which is noted on it, and I would have to recognize the stock as not being a good transfer, therefore not a good delivery, and therefore not a negotiable instrument.

Any member of the New York Stock Exchange will verify what I tell you. Since the stock could not be sold it had no fair market value. No bank would loan money on this—it is not collateral— it is nothing until February 12, 1930.

It might have been possible to find a buyer out of the routine of the New York Stock Exchange—in other words you might find a buyer for anything some place, but only at a tremendous discount would this stock have been bought and it would be conceivable to pass 100 shares of this along for $3.00 a share at the time during November and December, 1929, when the markets were very panicky and if you attempted to sell somebody stock for delivery three months

in the future—well there was no market unless you can isolate one and find it some place, so that is the basis for my conclusion that the stock was not transferable, it was not good collateral and no stock exchange would take your order under such circumstances.

Before coming down here, I discussed this matter with my partner, who was a former partner in a stock exchange house and he reached the same conclusion about it that I have.

Under cross-examination by counsel for the respondent, the witness testified as follows:

I will be thirty-four in July. I worked as customers' man for Bainbridge and Ryan. I was buying and selling for customers' accounts but not to any extent. Thereupon the following proceedings took place:

Q. What investigation did you make of this stock?

A. Just now? You mean just recently after looking into this case?

Q. You said you were familiar with the stock in 1929?

A. I had known of this stock for quite some time. During the period of this situation a relative of Mr. Gelfand's [fol. 68] was a man whom I have known for years. We went through college together. I knew this situation had arisen at that time. While I did not see any of these papers he discussed it with me, and I knew something of the complications in the matter. Naturally I was interested in the stock and I watched the stock at that time and more recently, of course, I have looked at all of these papers—these that I have before me, for example, Exhibit 2 and Exhibit 3, and some other papers on the case that Mr. Luce showed to me.

Q. Do you know anything about the structure of the Kraft-Phoenix Cheese Corporation?

A. No, I have not looked into the balance sheet of the corporation, if that is what you mean.

The witness then further testified under cross-examination as follows:

I know what business the Kraft-Phoenix Cheese Corporation was engaged in. In the cheese business, dairy products business. I knew that the company had spent a number of years acquiring smaller businesses and they kept build-

ing up their assets through constant acquisition and additions by payment of cash and stock, and I knew they were finally absorbed by the National Dairy Products Company.

Thereupon the following proceedings took place:

Q. Do you know anything about the financial history of the company?

A. I do not, off-hand; but I have made an analysis and I have it in writing, and I prepared it for——

Q. Do you know anything about the number of companies that they acquired over a short period of years?

A. No, except that I know there were negotiations.

Q. Would you say that they were engaged in a program of amalgamation and expansion during this period, from 1902 on until they were taken over by the National Dairies?

A. Yes, I would say so.

Q. You said you made an investigation of the listing of this stock. What do you mean by that?

A. Investigation of what?

[fol. 69] Q. I understand you to say upon direct examination that you had made an examination with respect to the listing of this stock?

A. That is an error in questioning, because the stock has been listed for a long time.

Q. For a number of years?

A. Yes.

Q. What did you testify about November 12, 1929?

A. That I believe on November 12, during the morning, the pressure on the stock became very heavy and the book on stock was closed and the stock was not delivered during the balance of the day.

Q. You mean there were no sales or purchases on November 12?

A. Excuse me, after 12 o'clock; sometimes in the late morning.

Q. Do you know anything about the earnings of this Kraft-Phoenix Cheese Corporation?

A. No; my estimate of the fair market value of this stock is based upon the market for the security itself and not on the underlying value of its earnings.

Q. That has nothing to do, in your opinion, with the market value of these stocks?

A. Not with these particular restricted shares.

Q. Might I ask, Mr. Warner, if in your opinion any stock of any corporation that the sale of which is restricted we will say for a period of three months has any market value during the period of restriction?

A. I consider that it has no more market value than a non-negotiable note.

Mr. Mather: I would like to have the reporter read the question for you again.

(The pending question was read by the reporter, as follows:)

Q. "Might I ask, Mr. Warner, if in your opinion any stock of any corporation that the sale of which is restricted we will say for a period of three months has any market value during the period of restriction?"

Mr. Mather: Can you answer that question, Mr. Warner?

The Witness: Yes, I can. Such stock has a market value but depending upon its restriction it might only be worth [fol. 70] ten per cent of what free stock would be worth—if you understand.

Q. No, I do not understand?

A. Since it is not a good transfer and it is not good delivery it is not good collateral it is not negotiable.

Q. Then it has no market value?

A. It has no market value . .

Q. Then any stock in any corporation, irrespective of what the corporation might be, the sale of which stock is restricted, has no market value?

A. I would not say that is true, but I would say to you it was especially true of the circumstances and the condition of the market at the time that this particular stock was restricted.

Q. All right; the stock of any corporation, the same of which is restricted for a period of three months, on November 12, 1929, would have no value?

Witness: It would have no sale value.

The witness then further testified under cross-examination:

I mean by "value", no sale market value, no fair market value. by fair market value I mean that no market for the

stock with such restrictions actually existed at all. There is no such market. In my experience as a banker or investment broker, I have never known of sales of any stock which was restricted. I have heard of stock being offered for sale through me but there has been no market for it.

The following proceedings then took place:

Q. Would the fact that the restriction had been voluntarily placed upon this stock by the recipient of it make any difference in your opinion as to the value of the stock?

A. It would make no difference if the stock—if the face of the certificate bore the information which this certificate (indicating) bears—transfer of the stock being restricted under state of agreement, and then the date of the agreement were made evident and the agreement said that the stock could not be sold or transferred—there would be no market for the stock.

[fol. 71] Q. In your opinion, Mr. Warner, would this stock, Kraft-Phoenix Cheese Corporation stock, have any value on November 12, if it did not have written across the face of it "Transfer restricted until February 12, 1930, as per agreement of November 12, 1929"?

A. What other stock would have a market value?

Q. And what would that market value be, Mr. Warner?

A. Approximately the quotation or exactly the quotation that existed for the stock on the New York Stock Exchange on any given day.

Q. Then any stock that is not restricted and is listed on the New York Stock Exchange, and being dealt with on the New York Stock Exchange, would have a value of the price paid for it on the Exchange at that time?

A. It would have such a market value.

Q. There was stock of the Phoenix—the Kraft-Phoenix Cheese Corporation, billed on the New York Stock Exchange between November 12, 1929, and February 12, 1930, was there not? Or don't you know?

A. There was.

Q. When you say, Mr. Warner, in your opinion that this stock, Petitioner's Exhibit No. 3, had no value you do not assume, do you, that there is a willing seller and a willing buyer?

A. I assume that there is no willing buyer and that the seller is not empowered to sell.

Q. Did you know, Mr. Warner, that on September 12, 1924, the Kraft Cheese Company was incorporated and offered 6,000 shares at $5 par value common stock, and 2,000 shares of $100 par value preferred stock to the public in blocks of 10 shares of preferred and 30 shares of common stock at a price of $1,150 per block?

The Witness: Can I answer the question now? I have not exact knowledge. I do not know that that is so.

By Mr. Mather:

Q. Did you know on October 12, 1925, the Kraft Cheese Company called its outstanding debentures and outstanding preferred stock of the Kraft-McLaren Cheese Company, listed for redemption at the total price of 104½?

Mr. Luce: I object, your Honor. The other question re-
[fol. 72] ferred to 1924; this question refers to 1925. We have got the taxable year 1929 involved.

The Member: This is not direct evidence in the case and counsel has a right to inquire as to all sources of knowledge of this witness. Objection overruled.

Mr. Luce: I would like to note an exception.

The Witness: No, I did not; as I said this morning, I have a limited statistical knowledge of the earnings of this company, or any statistical information that you want. But my purpose here, I understand, was to give my opinion as to whether or not this restricted stock had a fair market value before February 12, 1930.

The witness then further testified under cross-examination:

I know that dividends had been regularly paid on the stock. This particular stock, Exhibits 1 and 3, had no market value because it was restricted. That is the only reason it had no market value. In my opinion the stock of any corporation, irrespective of what the corporation might be or irrespective of what the stock might be which is similarly restricted in its sale, would have no market value or no fair market value at any time during the period of restriction.

Upon redirect examination the following proceedings took place:

Q. Now, Mr. Warner, you have testified that you have knowledge of stock of the Kraft-Phoenix Cheese Corpora-

tion being sold on the market of the stock exchange along in November and December, 1929, and, early in 1930, at approximately $30 a share, approximately. Is that a fact, and did you so testify?

Yes, sir; approximately.

Q. You also testified that this particular 17,250 shares of stock, a copy of which you have before you, had no fair market value as of November 12, 1929. Is that a fact?

A. That is right.

[fol. 73] Q. As a matter of fact is this stock, this group of 17,250 shares of stock, a specimen of which you have before you, as Petitioner's Exhibit No. 3, is that, as a matter of fact, the same stock that was being sold on the market in November and December 1929?

Mr. Mather: I object your Honor.

The Member: That is a question of fact. If the witness knows of his own knowledge he can testify to it.

Objection overruled.

Mr. Mather: I would like an exception noted.

The Witness: It is not the same stock for the purpose of trading.

By Mr. Luce:

Q. Why?

A. Because the stock that was traded on the New York Stock Exchange that day was unrestricted free stock. This is restricted stock, not a good transfer, not a good delivery, not negotiable. No stock exchange house would take this stock and attempt to sell it on any New York Stock Exchange in the period from November 12 to February 12.

The witness then further testified upon redirect examination as follows:

I mean by "it wasn't a good transfer" that title to the stock could not be transferred. I mean that the G & K Company, after receiving their stock, could not have sold that stock to you if they had wanted to. I know that to be a fact for regular deliveries. This stock is differently classified almost as though one stock was classified A and another B. This, temporarily, had an entirely different value.

In my opinion the restriction, "Tranfer restricted until February 12, 1930, as per agreement of November 12,

1929'' put a different classification on the stock, made it a different kind of stock. It did not make it a preferred stock. It made it a common stock with restrictions. That applies to this 17,250 shares of stock. It became restricted [fol. 74] as to transfer and deliveries and sales on the New York Stock Exchange. The stock had no value on the New York Stock Exchange. When I testify as to no value I, of course, mean on the New York Stock Exchange. They could not sell it on the New York Stock Exchange. The G and K could not have sold it to anyone because of their agreement not to. I doubt very much if they could have sold it. They might have found a speculative buyer for the stock. I know they could not have sold it. I know they could not sell it on the New York Stock Exchange, but they might have found a buyer over the counter at a tremendous discount. I do not know of sales of similar stock. I do not know what similar stock is sold for. I know of no market on the New York Stock Exchange or otherwise for stock that was restricted as this stock was restricted.

By tremendous discount, I mean if stock were offered to me that was guaranteed to sell at $10.00 per share and it had some such restriction on it, I would not buy it unless it were offered to me at a low price of about $1.00 a share or about a tenth of its listed value.

Mr. Thomas P. Trevvett was then called as a witness for the petitioner and, after having been first duly sworn, was examined and testified as follows:

I am at present connected with Harriman & Co., 815 Fifteenth Street, N. W., Washington, D. C., and am assistant manager of the branch in Washington. I have been associated with Mr. Harriman since 1919, occupying many positions, the latest one being head of the statistical department for eight years until my present position as assistant manager of the office in Washington.

The nature of my duties and Mr. Harriman's business is a brokerage business, stock brokers. I have had experience in the buying and selling of securities, stocks and bonds. For about three years I was in the Order Department of Harriman & Co., in New York, during which time I handled a huge sum of buying and selling orders for clients, both on the stock Exchange and over the counter.

At other times I have handled clients' accounts throughout my career with Harriman.

[fol. 75] My opinion has been requested as to the fair market value of certain stocks of the Kraft-Phoenix Cheese Corporation which were transferred to the Gelfand Manufacturing Company in 1929. I have examined the agreement of November 12, 1929, pursuant to which the stock was transferred from Kraft-Phoenix Cheese Corporation to the Gelfand Manufacturing Company. I have examined a specimen of the certificates of the stock transferred under that agreement. I have formed an opinion as to the market value of those particular shares of stock transferred under that agreement of November 12, 1929.

The following proceedings then took place:

Q. Will you state to the Board and to counsel your opinion as to the fair market value of that particular stock?

Mr. Mather: That is objected to because it is only a conclusion, the witness not having qualified.

The Member: I think the witness is qualified. Objection overruled.

Mr. Mather: Your Honor will allow me an exception.

The Member: Exception noted.

The witness then further testified as follows:

My opinion is that it has no market value. My reasons for stating that is that it would be very difficult, if at all possible, to have found somebody to purchase it, market value depending upon the willingness of some buyer to buy it. I think a buyer would be unwilling to buy it because it has a restriction on it which ties him up from reselling it, as he may or may not wish to do, until such period of time has elapsed while any number of things might have happened to the market, and I do not believe he would want to take that chance.

I was in the stock brokerage business in 1929. I was acquainted with the market conditions at that time. The market conditions in November and December, 1929, were entirely demoralized.

[fol. 76] I think the willingness of a buyer to trade in this particular stock would be affected by the market conditions in 1929. He would have been a little less anxious to buy stocks because of having witnessed a tremendous debacle

in prices and I think he would be very fearful of making commitments.

Under cross-examination, the witness testified as follows:

I am not exactly familiar with the price range of the undestricted stock of the Kraft-Phoenix Corporation that was dealt in on the market on the New York Stock Exchange. I can get such information in a fraction of a minute on all stocks listed on the New York Stock Exchange.

The following proceedings then took place:

Q. It was quoted from $27 to $30 a share on November 13, 1929, and its price range from November 14 to 30, 1929, was from $31 to $38.50 a share, and in December, 1929, it was quoted from 32⅛ to 43. That was during the demoralizing period of the stock market, was it not?

A. There was a material slight rebound from that condition; yes.

Q. And back in November—on November 12, 1929, the low was 28 a share and high 32⅞ a share, and from then on it continued to increase right along. Did you know that?

A. No, I did not know that.

Q. Would that make any difference in your testimony, if you had known it?

A. No; we had many upturns in 1929, prior to November.

Q. The price range in January was from 38 to 47. You did not know that, did you?

A. Such knowledge as that I could very easily have in a minute.

Q. And in February, 1930, the price range was from 43 to 49¼. Did you know that?

A. No, sir.

Q. And do you know that this stock was continually increasing on the New York Stock Exchange up until July 1930, when the high was 49⅛. Did that show this demoralizing condition from November 1929, on the New York Stock Exchange?

A. Shall I answer that?

[fol. 77] Q. No, you don't need to answer it. What do you understand as "fair market value"?

A. What somebody is willing to pay for a stock.

Q. Well is that all?

A. I would say it is a price at which a willing buyer and a willing seller will get together and meet.

The witness then further testified as follows:

When I arrive at the market value of Petitioner's Exhibit No. 3, I do not assume a willing buyer and a willing seller. I am saying from experience that in stocks of that type very rarely can there be found a willing buyer. I assume there is no willing buyer, and in arriving at "no market value" I assume no willing buyer.

The following proceedings then took place:

Q. And in your opinion, would any restricted stock have a market value, or a fair market value during the period of restriction?

A. Occasionally there are some that have a market value?

Q. Tell us what stocks they are?

A. Well, I can recall the Durant Motors, traded in escrow for a number of years; City Service which was traded in escrow which is similar to this restriction although it is not quite as restrictive as this.

Q. What were the restrictions on those two stocks?

A. They could not be sold until such and such dates.

Q. And those stocks had a market value?

A. Somewhat; yes, sir.

Q. Well, how were they different from this particular stock?

A. Well, I should say in this case that the stock which was restricted for transfer and delivery was an agreement on the side that it should not be sold, would be an agreement between parties and is much more restricted than one sold only with the agreement that they could not be sold until a specified date. The stock in question is much more restrictive.

Q. The stock says right on its face it cannot be transferred and the agreement says it cannot be transferred for a period of whatever it may say. On the certificate is written "Transfer restricted until February 12, 1930, as per agreement of November 12, 1929." and that means to you [fol. 78] then, doesn't it, that the corporation that issues the stock will not transfer for that period?

A. Yes, sir.

Q. It means the same thing to me too. I am glad we can agree on something. And in your opinion the stock of any

corporation which contains written on the certificate "Transfer restricted" until a certain date has no market value, is that true?

A. I should say "yes", with very few exceptions.

Q. Well, give us the exceptions?

A. I have just noted one, of Durant Motors. We occasionally had a buyer quite considerably under the market for its regular stock.

Q. You told us the restrictions on that were different from this?

A. Yes, sir; slightly. This one had an agreement between two parties which the other stocks did not have.

Q. The other one just had written on it?

A. It had a stamp on it?

Q. Restricted for a certain period?

A. Yes, sir.

Q. And this has transfer restricted on it. Is that the difference?

A. It might not be similar to that. I could not say as to the wording of it. They might be almost identical.

Q. Then how does that have a market value, and this one does not have?—In your opinion?

A. There was a willingness of some buyer to buy it at that time.

Q. You mean you know of a case where it was sold?

A. Yes, sir; far under the market value.

Q. And where you assume that you have no willing buyer in that particular stock? Is that true?

A. I assumed it, with the qualification that there might be a lucky chance that there might be a buyer.

Q. So that there might be a buyer; so that it has no value in this case. Is that your testimony?

A. I was asked if it had a "fair market value".

Q. That is what I am asking you?

A. I know of no particular at the time. I cannot say other than that it had no "fair market value."

Q. And I am asking you if you know of any stock that has any fair market value with that restriction on?

A. I know of some which have had a fractional value of the value of the regular stock, which it eventually was exchanged into, the market not being anywhere near as sure [fol. 79] or as positive as the market for the regular stock. It happened occasionally that we found a buyer. I know that some stocks sold at that time?

Q. You know that some stocks with restrictions on that were sold, but you know of no stock with a restriction on that has a fair market value?

A. I know of no restricted stocks of other corporations in the past which have had some sales. I know of none, to my knowledge, of the class here, so restricted, as this one we have here, in Exhibit No. 3.

The witness then further testified as follows:

It is my opinion that it is very unlikely that the stock of any corporation, with a restriction similar to the restriction of the Petitioner's Exhibit No. 3, would have any fair market value.

At the moment I am not familiar with the assets of Kraft-Phoenix Cheese Company, although in the past I have investigated, but I have investigated quite a number of corporations and I cannot remember them all.

I know vaguely about the financial history of Kraft-Phoenix Cheese Company. It entered into a large expansion program to get control over quite a number of corporations at that time and eventually landed in financial difficulties. I do not remember what the financial difficulties were.

I could not answer from memory and I do not know whether the earnings of Kraft-Phoenix Cheese Company have steadily increased until it was taken over by the National Dairy Products Company.

I am not familiar with whether the Kraft-Phoenix Company paid dividends consistently since 1902.

In my experience in the brokerage business, it is very seldom that restrictions are placed on stock. There are not a great many cases of it. The reason that restrictions are usually placed on stock is because two companies are consolidating, it is to maintain and keep both parties interested in the company for a certain period of time after the acquiring.

I would not want to say that the reason restrictions are placed upon stock is to improve the market condition of the stock by not unloading a large block of stock at any one time, that may have something to do with it.

[fol. 80] I know nothing of the assets of Kraft-Phoenix Cheese Corporation on November 12, 1929. I have known it at times, but I do not recall at what times. I have

looked the company up. I could refresh my memory from statistical records in our office, such as Poor's Manual, Moody's, and that sort of thing. That would be the information from which I would refresh my recollection.

I do not know how many wholly-owned subsidiaries the Kraft-Phoenix Corporation had in 1929. I do not know that it owned 18 subsidiaries and 15 controlled companies at that time, but I could easily verify that from Poor's Manual.

In my opinion the fair market value of Petitioner's Exhibit No. 3, if it were not restricted, would be the fair market value as represented by the sales on the New York Stock Exchange on whatever date one has in mind.

The following proceeding then took place:

Q. In other words, if this stock, Petitioner's Exhibit No. 3, were not restricted, and that stock was quoted on the New York Stock Exchange on November 13, 1928 at 27 to 30 dollars a share, you would say that was a fair market value?

A. Yes, sir; for a limited amount of the stock; a large block of stock being sold on that day might have driven the price down, or a large purchase on the same day by a buyer might have caused it to come up quite considerably the same day.

Mr. Mather: That is all.

(The witness was excused.)

Mr. Luce: It has been agreed between counsel that in the second paragraph of the agreement of November 12, 1929, Exhibit No. 2, that the words "party of the first part" be substituted for "party of the second part". That was a typographical error and counsel are agreed to making the change.

The Member: Is that agreed to?

Mr. Mather: Yes.

There was then offered and received in evidence as Petitioner's Exhibit No. 4, a certified copy of the Articles of [fol. 81] Amendment, showing the change in name of the Gelfand Manufacturing Company to the G and K Manufacturing Company. Said exhibit is attached hereto and made part of this Statement of Evidence.

The foregoing evidence is all of the material evidence adduced at the hearing before the United States Board of Tax Appeals.

Claude I. Parker, Llewellyn A. Luce, 937 Munsey Building, Washington, D. C., Counsel for Petitioner on Review. Approved: Robert H. Jackson, Assistant General Counsel, Bureau of Internal Revenue.

ORDER SETTLING STATEMENT OF EVIDENCE

The foregoing is all of the material evidence adduced at the hearing and in order that the same may be preserved and made a part of the record, this statement of evidence is duly approved and settled, this 7th day of November, 1934.

(Sgd.) C. M. Trammell, Member, United States Board of Tax Appeals.

PETITIONER'S EXHIBIT No. 4

The Gelfand Manufacturing Company

Articles of Amendment

This is to certify:

First. That the Board of Directors of The Gelfand Manufacturing Company, a Maryland corporation having its principal office in Baltimore City, State of Maryland, at a meeting duly convened and held on November 6, 1929, adopted the following resolution:

[fol. 82] Resolved:

1. That it is advisable to amend the charter of the Corporation by striking out Paragraph I of the Certificate of Incorporation and inserting in lieu thereof the following:

I

The name of the Corporation is

"The G. & K. Manufacturing Company."

2. That a meeting of the Stockholders of the Corporation to take action upon the Amendment advised as afore-

said be and the same is hereby called to convene at the principal office of the Corporation in Baltimore, Maryland, on November 6, 1929, at three o'clock P. M.

Second. That the meeting of the Stockholders of the Corporation called by the Board of Directors of the Corporation as aforesaid, and duly warned in the manner provided by law, was held on November 6, 1929, pursuant to waiver of notice duly executed and filed with the records of the meeting, and at said meeting the stockholders, by the affirmative vote of two-thirds of the stock outstanding, and entitled to vote, duly adopted the Amendment of the Charter of the Corporation, advised by the Board of Directors as aforesaid.

In witness whereof The Gelfand Manufacturing Company has caused these presents to be signed in its name and on its behalf by its Vice-President and its corporate seal to be hereto attached and attested by its Secretary on November 12th, 1929.

The Gelfand Manufacturing Company, by J. Kurnik, Vice-President. Attest: Colman Sachs, Secretary. (Corporate Seal.)

[fol. 83] STATE OF MARYLAND,
City of Baltimore, ss:

I hereby certify that on this 12th day of November, 1929, before me, the subscriber, a Notary Public of the State of Maryland, in and for the City of Baltimore, personally appeared Dr. Jacob Kurnik, Vice-President of The Gelfand Manufacturing Company, a Maryland corporation, and on behalf of the Corporation acknowledged the foregoing Articles of Amendment to be the corporate act of the Corporation; and at the same time personally appeared Colman Sachs and made oath in due form of law that he was Secretary of the meeting of Stockholders of the Corporation at which the Amendment of the Charter of the Corporation set forth in said Article of Amendment was adopted, and that the matters and facts set forth in said Articles of Amendment are true to the best of his knowledge, information and belief.

Witness my hand and notarial seal, the day and year last above written.

Ida Brenner, Notary Public. (Notarial Seal.)

Articles of Amendment of "The Gelfand Manufacturing Company", changing its name to "The G. & K. Manufacturing Company", received for record November 13, 1929, at 10:00 o'clock A. M., and approved by the State Tax Commission of Maryland November 13, 1929, as in conformity with law and ordered recorded.

(Signed) Jesse D. Price, (Signed) Edward O. Weant, Commissioners.

It is hereby certified that the within instrument is a true copy, as received, approved, and recorded in Liber No. 92, Folio No. 499, one of the Charter Records of the State Tax Commission of Maryland.

[fol. 84] As witness my hand and seal of the said Commission at Baltimore, this 29th day of March, 1930.

Thomas A. Murray, Jr., Secretary.

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

[Title omitted]

PRÆCIPE FOR RECORD—Filed November 7, 1934

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Fourth Circuit heretofore filed by the petitioner on review.

1. Docket entries of the proceedings before the Board.
2. Pleadings before the Board.

(a) Petition filed with the Board, including annexed copy of Commissioner's notice of deficiency.
(b) Answer filed by respondent.
(c) Amended petition.
(d) Answer filed by respondent.

[fol. 85] 3. Stipulation of facts filed with the Board of December 14, 1933, with Petitioner's Exhibits 1, 2 and 3 attached thereto.

4. Statement of Evidence as approved by the Board, with Petitioner's Exhibit 4 attached.

5. Memorandum Opinion of the Board.

6. Respondent's Motion for Judgment.

7. Decision of the Board entered May 17, 1934.

8. Petition for Review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.

9. Order Enlarging Time for the preparation of the evidence and for the transmission and delivery of the record not included in record.

10. This præcipe.

Claude I. Parker, Llewellyn A. Luce, 937 Munsey Building, Washington, D. C., Counsel for Petitioner on Review.

Service of a copy of the within præcipe is hereby admitted this 7th day of November, 1934.

No objection thereto.

Robert H. Jackson, Assistant General Counsel, Bureau of Internal Revenue, Counsel for Respondent on Review.

[fol. 86] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 87] PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 3810

THE G AND K MANUFACTURING COMPANY, Petitioner,

versus

COMMISSIONER OF INTERNAL REVENUE, Respondent

On Petition to Review the Decision of the United States Board of Tax Appeals

December 7, 1934, the transcript of record is filed and the cause docketed.

Same day, Motion of petitioner for extension of time for preparation and transmission of the record is filed.

Same day, order extending the time for the preparation and transmission of the record is filed.

Same day, certified copy of order extending the time for the transmission of the record is filed.

Same day, the appearance of Llewellyn A. Luce is entered for the petitioner.

December 12, 1934, the appearance of Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Rev-[fol. 88] enue, and T. M. Mather, Special Attorney for the Bureau of Internal Revenue, is entered for the respondent.

December 17, 1934, twenty-five copies of the printed record are filed.

December 19, 1934, the appearance of Frank J. Wideman, Assistant Attorney General, and Sewall Key, Special Assistant to the Attorney General, is entered for the respondent.

January 31, 1935, the appearance of J. Louis Monarch, Special Assistant to the Attorney General, is entered for the respondent.

ARGUMENT OF CAUSE

February 4, 1935, (January term, 1935) cause came on to be heard before Parker and Soper, Circuit Judges, and McClintic, District Judge, and is argued by counsel and submitted.

[fol. 89] UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 3810

(Argued February 4, 1935. Decided April 2, 1935)

THE G AND K MANUFACTURING COMPANY, Petitioner,

versus

COMMISSIONER OF INTERNAL REVENUE, Respondent

On Petition to Review the Decision of the United States Board of Tax Appeals

Before Parker and Soper, Circuit Judges, and McClintic, District Judge

Llewellyn A. Luce (Claude I. Parker on brief) for Petitioner, and J. Louis Monarch, Special Assistant to the Attorney General, (Frank J. Wideman, Assistant Attorney General, and Sewall Key, Special Assistant to the Attorney General, on brief), for Respondent

OPINION—Filed April 2, 1935

SOPER, Circuit Judge:

The G and K Manufacturing Company seeks a review of a determination of a deficiency of $19,805.16 in its income [fol. 90] tax for the year 1929, which the Commissioner of Internal Revenue based upon a profit involved in a transaction whereby the taxpayer sold and transferred its business and assets to the Kraft-Phenix Cheese Corporation, in consideration of $200,000 in cash, and 17,250 shares of the common stock of the latter corporation. The transaction was covered by an agreement of August 23, 1929, as modified by a supplemental agreement of November 12, 1929, whereby the taxpayer agreed to sell the business conducted by it and all the assets thereof, tangible and intangible, subject to certain liabilities as shown on an attached statement, excluding, however, the shares of the capital stock in the Pickle Products Company and the Gelfand Manufacturing Company of California, subsidiary corporations of the tax-

payer, and the assets thereof, certain lots of ground not used in connection with the business, and other minor items belonging to the taxpayer. The taxpayer agreed that for ten years it would not engage in a business competitive to that sold, or make any sale of its products in any portion of the United States, other than California, Washington, Oregon, Idaho, Utah, Nevada, Arizona and Montana.

The purchase price fixed by the original agreement was $1,115,492.76, of which $600,000 was to be paid in cash and the balance in the common stock of the purchaser. By the second or supplemental agreement of November 12, 1929, the parties changed the method of payment of the purchase price, and fixed it at the sum of $200,000 in cash, and 17,250 shares of the common stock of the purchaser; and the taxpayer agreed that it would not sell or assign the stock prior to February 12, 1930, without the written consent of a subsidiary corporation, wholly owned by the purchaser. It was also agreed that if, during that period, or within ninety days thereafter, the holders of a majority of the common stock of the purchaser should deposit it pursuant to a plan of reorganization, merger or consolidation, the taxpayer [fol. 91] would also in like manner deposit its holdings of the common stock of the purchaser.

On November 12, 1929, the agreements were carried into effect. The assets of the taxpayer were conveyed to the purchaser and the purchase price was paid and transferred to the taxpayer. The restriction upon the transfer of the stock was noted on the stock certificates received by the taxpayer, and in accordance therewith, the taxpayer neither sold nor transferred any of the stock during the year 1929. On November 12, 1929, the common stock of the purchaser ranged in price from $28 to $32⅞ per share, or an average of $30.4375. Between November 12 and November 30, 1929, it ranged from $31 to $38.50 per share, and in February, 1930, when the restriction expired, the price ranged from $43 to $49¼ per share.

On May 12, 1930, the shareholders of the Kraft-Phenix Cheese Company, the purchaser, ratified an agreement by which it was merged with and sold to the National Dairy Products Corporation, in accordance with an agreement made on March 17, 1930, and amended on April 17, 1930, whereby the preferred stock of the Kraft-Phenix Cheese Company was retired and each share of its common stock

(including common stock owned by the taxpayer) was exchanged for $25 par value of 5¼% gold debentures due in 1948, and one-half of a share of the common stock of the National Dairy Products Corporation. The lowest combined price for these securities between March 1 and August 1, 1930, was equivalent to $46.50 per share of the common stock of the Kraft-Phenix Cheese Corporation.

The taxpayer remained in existence after the transfer, and so far as the record shows, remained in business. It reported a profit on the sale of its business and assets, treating the stock of the Kraft-Phenix Cheese Corporation as having a fair market value of $20 per share. The Commissioner determined an additional profit by valuing the [fol. 92] stock of $30.4375 per share, the average market price on November 12, 1929, when the taxpayer received it. The taxpayer filed a petition for review, describing the transfer as a sale, and making the sole contention that the Commissioner erred in increasing the value of the stock. Subsequently, it filed an amended petition making the additional contention that it was error to include as income any part of the value of the 17,250 shares of stock; and finally in a second amended petition, the taxpayer challenged the Commissioner's determination upon the following grounds, namely (1) that the transaction with the Kraft-Phenix Cheese Corporation was a reorganization within the meaning of Paragraph A of Section 112 (i) (1) of the Revenue Act of 1928, 45 Stat. 791, and (2) that the stock of the Kraft-Phenix Cheese Corporation, by reason of the restriction upon its transfer, had no fair market value when received. These two contentions are renewed in this court, with the addition, that in any event, the fair market value of the stock when received was not more than one-tenth of the list price on the New York Stock Exchange of the same stock unrestricted as to transfer.

We agree with the Board of Tax Appeals that these contentions cannot be sustained. In considering the first point, it must be borne in mind that under Section 112 (a) of the Revenue Act of 1928, the general rule is that gains upon the sale or exchange of property must be recognized, except as thereafter provided in the section. The exception upon which the taxpayer relies is found in Section 112 (b) (4) and Section 112 (d) which, amongst other things, provide in substance that if a corporation, a party to a reorganiza-

tion, exchanges property in pursuance of a plan of reorganization, for property consisting not only of stock or securities in another corporation, a party to the reorganization, but also of other property or money, then if the corporation receiving the property or money does not distribute it in pursuance of the plan of reorganization, the gain, [fol. 93] if any, to such corporation, shall be recognized in an amount not in excess of the sum of money and the fair market value of the property so received. Reorganization is defined in Section 112 (i) (1) (A) to mean "a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation)".

The taxpayer argues that in the course of the transaction now under consideration, it transferred substantially all of its property, and by retaining the stock received in the sale or exchange, it preserved a continuity of interest in the business conducted by the taxpayer before the sale and by the purchaser thereafter. Hence it says that the transaction may fairly be regarded as a reorganization within the liberal interpretation of that term prescribed by the decided cases. See Pinellas Ice Co. vs. Commissioner, 287 U. S. 462; C. H. Mead Coal Co. vs. Commissioner, 72 F. (2d) 72); Cortland Specialty Co. vs. Commissioner, 60 F. (2d) 937; Prairie Oil & Gas Co. vs. Motter, 66 F. (2d) 309; Lonsdale vs. Commissioner, 32 F. (2d) 537; see also John A. Nelson vs. Commissioner, (C. C. A. 7), February 23, 1935; Gregory vs. Helvering, 55 S. C. R. 266. These cases do decide that the terms "merger" and "consolidation" in Section 112 (i) (1) (A) are not to be construed with technical precision, for they are modified by the words in parenthesis. Thus the Supreme Court said in Pinellas Ice Co. v. Commissioner, 287 U. S. 469, 470:

"The words within the parenthesis may not be disregarded. They expand the meaning of "merger" or "consolidation" so as to include some things which partake of the nature of a merger or consolidation but are beyond the ordinary and commonly accepted meaning of those words—so as to embrace circumstances difficult to delimit but which in strictness cannot be designated as either merger or consolidation".

[fol. 94] So it may be, as held by this court in C. H. Mead Coal Co. vs. Commissioner, supra, that a merger of corporations, which ordinarily contemplates the extinction of one of the participants, or a consolidation which usually contemplates the extinction of the several corporations which combine, will take place in the sense of the statute without the technical dissolution of the corporation, or corporations ceasing to operate. Nevertheless, not every sale or exchange of corporate assets wherein stock of the purchaser is received as payment and retained by the buyer, amounts to a reorganization. The words in parenthesis modify the terms "merger" and "consolidation" but do not destroy them. The underlying purpose of the statute was to exempt purely paper profits from taxation, and to this end, an attempt was made to define or describe transactions in which there is an adjustment of corporate structures without actual realization of profit. The precise limitations cannot be easily defined, but the transaction must at least partake of the nature of a "merger" or "consolidation". In our opinion, that cannot be said of the transfer under consideration. It was in effect a sale of the assets and business of the taxpayer used in the manufacture and sale of food products; but not only did the taxpayer continue to exist, but its subsidiaries seemingly continued to engage in business and the stock thereof was expressly excepted from the sale. The extent of these holdings is not shown in the evidence; but it is clearly indicated that the subsidiaries had some assets and some active business, for it was represented in the contract of sale that no assets of the subsidiaries were included in the list of assets transferred, and covenants were exacted whereby both the taxpayer itself and a subsidiary of the same name, incorporated in California, were required to refrain from any business competitive with the business sold, except in eight named states in the western part of the United States. There is no evidence in the [fol. 95] record to show that the taxpayer and its subsidiaries did not continue actively in business after the sale took place in 1929. Hence the taxpayer did not show with certainty that all or even substantially all of its assets were transferred; and even if such a transfer did take place, the taxpayer remained in existence, possessed of a substantial amount of money, qualified to engage in active business in its own capacity or through its subsidiaries, and with the

intent so to do, so far as the record shows. We are therefore unable to conclude that a reorganization within the meaning of the statute had taken place.

Since any gain involved in the transfer must be recognized for purposes of taxation, it becomes necessary to consider the taxpayer's second contention that the stock received either had no fair market value at all, by reason of the restriction against alienation for three months, or none in excess of one-tenth of the list price on the New York Stock Exchange. Two witnesses for the taxpayer at the hearing before the Board, experienced in the business of buying and selling securities of the sort under consideration, testified that the restricted stock had no fair market value during the months of November and December, 1929, and could not have been sold for more than one-tenth of the list value, or approximately $4 a share. This testimony was uncontradicted, and no other evidence on the point was introduced other than the stipulation of the parties as to the average price on November 12, 1929, and the price range thereafter as hereinbefore set out. The taxpayer contends that the Board erred in disregarding this testimony and in valuing the stock at the same price as stock free from any restriction upon its transfer. It may be conceded that ordinarily a restriction upon the transfer of stock would constitute evidence that its market value had been lessened, which the Board could not fairly ignore. But, in the pending case, the nature and purpose of the restriction were shown by other evidence from which the [fol. 96] Board concluded that the rule to be applied was enunciated in such cases as Wright vs. Commissioner, 50 F. (2d) 727, and Newman vs. Commissioner, 40 F. (2d) 225; that is to say, that a voluntary agreement to abstain from the sale or transfer of property received in a sale or exchange, need not be considered in determining the market value of the property received; nor may a taxpayer postpone the taxation of a gain involved in the acquisition of property by agreeing not to sell for a certain period that which he has received.

The evidence in the pending case justifies the inference that the restriction was voluntarily imposed by the parties in order to maintain the market price for their mutual advantage; and that in fact, it had this result. The supplemental agreement of November 12, 1929, contained an ex-

press stipulation that the taxpayer would not sell the stock for ninety days without the consent of the buyer, and during that period, or within ninety days thereafter, would join in a subsequent reorganization with the holders of the stock. Within the additional period of ninety days, namely, on May 12, 1930, the Kraft-Phenix Cheese Corporation was merged with and sold at advantageous prices to the National Dairy Products Company, in accordance with the agreement reached on March 17, 1930, and amended on April 17, 1930. Thus it is shown that the very purpose of the restricted agreement to benefit the parties was actually carried into effect. Finding no error in the decision of the Board, it is Affirmed.

[fol. 97] UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 3810

THE G AND K MANUFACTURING COMPANY, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

On Petition to Review the Decision of the United States Board of Tax Appeals

JUDGMENT—Filed and Entered April 3, 1935

This cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the decision of the said Board of Tax Appeals, in this cause, be, and the same is hereby, affirmed.

Morris A. Soper, U. S. Circuit Judge.

April 3, 1935.

On another day, to-wit, May 4, 1935, the mandate of this Court in this cause is issued and transmitted to the United [fol. 98] States Board of Tax Appeals, at Washington, D. C., in due form.

Clerk's Certificate

United States of America,
Fourth Circuit, ss:

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the entire record and proceedings in the therein entitled cause, as the same remain upon the records and files of the said Circuit Court of Appeals.

In testimony whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Asheville, North Carolina, this 22nd day of June, A. D., 1935.

Claude M. Dean, Clerk, U. S. Circuit Court of Appeals, Fourth Circuit. (Seal United States Circuit Court of Appeals, Fourth Circuit.)

[fol. 99] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted, limited to the question of the application of the statutory provisions as to reorganization, and the case is assigned for argument immediately following Nos. 184, 185 and 186.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 39,741. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 187. The G. and K. Manufacturing Company, Petitioner, vs. Commissioner of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed June 28, 1935. Term No. 187, O. T. 1935.

(7040-C)